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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON,
Petitioner,

against

MOORE-McCORMACK LINES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND SUPPORTING BRIEF

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findings to the contrary and that the same were not "clearly erroneous". There was similar violation in failing to adopt the District Court's correct determination of New York law and, instead, ruling differently on New York law without citing any New York statutory provision or decision in point which required or justified so ruling 50

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Frank A. Whittington, a casual dock worker (checker) on the piers of the New York harbor water front, respectfully shows:

Statement of Matter Involved

The petition is for a writ of certiorari to review a decision and judgment of the United States Court of Appeals for the Second Circuit (Judges Chase, Maris and Clark) made the 30th day of April, 1952, which reversed a judgment of the United States District Court, Southern District of New York (Edward J. Dimock, D. J.), for petitioner as plaintiff against respondent as defendant for $25,000 damages for

assault and battery and $42 costs, and directed dismissal of the complaint, and on June 10, 1952 denied a petition for rehearing duly filed May 14, 1952.

On defendant's appeal below the parties prepared and signed and the District Court approved (R. 6) a statement of the case pursuant to Rule 76, Fed. Rules Civ. Proc.

The action—with jurisdiction by reason of diversity of citizenship (Complaint, par. Third, R. 7; Per Curiam R. 18)—was for common law damages for assault and battery, the complaint being a replica of that in 3 Carmody's New York Practice 1936-7, taken from *Zimmerman* v. *Empire Mortgage Co.*, 189 App. Div. 898.

The evidentiary facts on the issue of liability were all stipulated in District Court (Stip., pars. 1-20, R. 2-5), and "both sides waived a jury and moved for a directed verdict on the issue of liability and in addition thereto counsel for the defendant moved for a dismissal of the complaint, plaintiff reserving the assessment of damages by a jury" (R. 5).

"The grounds for defendant's motions were that Cooke had no authority to assault this plaintiff and his acts were not binding upon the defendant Moore-McCormack and that in the absence of proof that the defendant instigated or directed the assault the affirmative defense of the Workmen's Compensation Law is an absolute bar to this action by the plaintiff" (R. 5).

The affirmative defense referred to alleged that defendant carried a policy of workmen's compensation insurance covering injuries "to its employees on account of any accident arising out of and in the course of their employment with this defendant"; that at the time of the assault "plaintiff was an employee of the defendant"; that the injuries "arose out of and in the course of his employment by defendant"; that "if" plaintiff's injuries "arose out of and in the course of his employment by defendant, the liability, if any, of defendant as prescribed by the Workmen's Compensation Law of the State of New York is exclusive and in place of any other liability whatsoever"; and that "if the injuries and damages allegedly sustained by plaintiff arose out of

and in the course of his employment by defendant, then, by reason of * * * the Workmen's Compensation Law of the State of New York, plaintiff is barred from the maintenance of this action and plaintiff's complaint is not within the jurisdiction of the Court" (Answer, Second Defense, pars. Sixth-Ninth, R. 10-11).

The establishment of this defense and the granting of defendant's motion thus would have required proof and finding (a) that plaintiff was an "employee" of the defendant when injured; (b) that the injury arose "out of" plaintiff's employment; (c) that it arose "in the course of" plaintiff's employment; (d) that it was "accidental"; (e) that plaintiff had no right to sue for damages rather than claim compensation as "employee", and (f) that this involved no violation of the Thirteenth or Fourteenth Amendments of the national Constitution.

The District Court, however, "denied defendant's motion to dismiss the complaint" and "granted the plaintiff's motion for a directed verdict upon the issue of liability" (R. 12), ruling "Upon the pleadings and the facts as stipulated * * * in this case that the plaintiff has not lost his common law remedy" (R. 5). Thereupon a jury was empanelled and sworn, heard the proofs upon the issue of damages, and returned a verdict for $25,000 (R. 12, 5).

Under Rule 52(a), Fed. Rules Civ. Proc., and because what was involved was the direction of a verdict, formal findings were not required (*Jones* v. *N. Y. C. R. Co.*, C. A. 6, 182 F. 2d, 326, cert. denied 340 U. S. 830). But the District Court's decision inherently involved finding and holding (a) that plaintiff was *not* an "employee" of defendant when injured; (b) that the injury did *not* arise "out of" employment of plaintiff; (c) that it did *not* arise "in the course of" employment of plaintiff; (d) that it was *not* "accidental"; (e) that plaintiff had a right to sue for damages rather than claim compensation as an "employee", and (f) that to hold otherwise would violate the Thirteenth and Fourteenth Amendments.

In their Agreed Statement on Appeal Pursuant to Rule 76 (R. 2), the parties stipulated (R. 5):

> "F. The sole question submitted to the Appellate Court for review is the correctness of the Trial Court's ruling that on the pleadings and the facts stipulated below, and made part hereof, the defendant is liable to the plaintiff at common law".

The statement made pursuant to Rule 76 of "the points to be relied upon by the appellant" specified (I) that the assault was beyond Cooke's authority, not within the scope of his authority and not binding upon the defendant, and (II) that "If Cooke was acting within the scope of his authority in assaulting plaintiff and the Trial Court so held, plaintiff is barred from the maintenance of this action by the provisions of the New York State Workmen's Compensation Law" (R. 6).

This literally raised no question as to the District Court's findings, or the sufficiency of the evidence to support its findings, that petitioner was not an "employee", and that the injury was not an accidental injury arising out of and in the course of employment of petitioner. Literally both stated points were concerned with the status of Cooke rather than the status of petitioner.

If, despite the limiting stipulation and statement herein, any review of the inherent findings could be made by the Court of Appeals (Cf. *United States* v. *Foster*, CCA 8, 123 F. 2d. 32), it could only be by reviewing and determining specifically (a) whether the Trial Court's findings were "clearly erroneous" (Rule 52(a)); (b) whether the stipulated evidentiary facts were sufficient to support the Trial Court's findings (Rule 52(b)); and (c) whether the attempt to treat plaintiff as an "employee" when assaulted for refusing to be an employee and his injury as one subject to the Workmen's Compensation Law, would violate the Thirteenth and Fourteenth Amendments, as well as the New York law itself, and whether the Trial Court's decision of these questions was "clearly erroneous" (Rule 52).

But the Court of Appeals did not review or determine these questions. Instead, it reversed the judgment and dismissed the complaint, with a *per curiam* opinion which casually described petitioner as "a checker of freight employed by the appellant on its Pier 32" and, completely distorting the issues, held:

> "The sole issue presented is whether the cause of plaintiff's injuries was 'accidental' within the meaning of the New York Workmen's Compensation Act since, if it was, it is not disputed that his sole remedy was that provided in the statute. If it was not accidental, however, the appellee can maintain this suit since the appellant is liable for the acts of the pier boss which were in furtherance of the employer's business * * *.
>
> Since the assault was not at the direction or instigation of the employer, the resulting injury was, insofar as the appellant was concerned, something neither intended nor expected. It was, therefore, 'accidental' within the meaning of the Compensation Act. * * * As the injury occurred while the appellee was leaving his employer's premises to go home, it was also incidental to his employment and within the coverage of that statute. * * * Consequently, the appellant's only liability is under section 11 of the Act" (R. 18-19).

This statement of "the sole question presented" is in direct contrast to "the sole question submitted" as stipulated by the parties. The decision, moreover, describing petitioner as "employed" by defendant and defendant as "his employer", and holding the injury "accidental", "incidental to his employment", and recovery "consequently" barred by the Compensation Act, was contrary to the stipulated facts and contrary to the Court of Appeals itself stating as facts that:

> "The assault was not due to any personal animosity on the part of the dock boss but, instead, was *the method he adopted to try to force* the appellee to work more overtime than the latter was willing to perform. The incident occurred on the pier when, after the appellee had worked some overtime, he was leaving the pier to go home" (R. 18). (Italics ours.)

Petitioner on May 14, 1952 (R. 22-30), pursuant to Rule 28 of the Rules of said Court of Appeals, duly filed a petition for rehearing. In it petitioner particularly enumerated and stressed, with references and quoted extracts from his originally filed brief in that Court, twelve items of argument covering fundamental points on which the District Court's judgment was based and which petitioner had urged in its support, but which the Court of Appeals apparently overlooked or bypassed (R. 24-25), and petitioner stressed his right under the due process provisions of the Constitution to have them determined before depriving him of his judgment. But the petition for rehearing, filed May 14, 1952, was denied June 10, 1952 (R. 31, 33).

The Stipulated Evidentiary Facts

The parties stipulated that respondent, a corporation engaged in shipping, was lessee of Pier 32, North River, New York, where it conducted all operations incidental to shipping, including freight handling. The pier was operated under direction of (1) a terminal operator, (2) under him, a superintendent of the pier, Mr. Kane, and (3) under him, various dock bosses, including a stevedore boss for longshoremen and one Arthur Cooke who was the dock boss for the checkers (R. 2).

"Cooke's duties consisted of employing the checkers needed to perform the daily work connected with the loading and unloading of vessels and in assigning the checkers to their various duties and locations." "Cooke had the authority to bind his employer, the defendant herein to contracts of hire for checkers" (R.3).

The daily "shape-up" method of hiring was used by defendant and by Cooke on its behalf. "The 'shape up' consisted of reporting at the pier gate in order to determine if there were vessels ready for loading or unloading '. "The checkers *selected and employed by Cooke each morning*

would sign the timekeeper's book and punch the clock". *"The plaintiff would 'shape up' each morning* unless he had been told on the previous day that there was work for him on the following day." (Italics ours).

On September 20, 1950, plaintiff had been employed for and had completed a day's work, terminating his contract of employment under the "shape up". "Under the custom the regular hours of employment were from eight o'clock in the morning until five o'clock in the afternoon, and overtime, if necessary, at an additional hourly rate." "Plaintiff's work consisted of checking freight upon the pier under the direct supervision of Arthur Cooke, the dock boss in charge of checkers" (R. 3).

"On the 20th day of September, 1950 the plaintiff proceeded with his customary duties until approximately 4:00 P. M. when a 'work distributor' under Cooke instructed the plaintiff to complete the checking of *a certain truck* and to work overtime, if necessary, in order to complete *the truck*". Accordingly, "the plaintiff worked overtime until approximately twenty minutes before 6:00 P. M., *then went over, puched the clock and checked out*" (R. 2-3). (Italics ours).

"After leaving the clock the plaintiff met Cooke who asked him why he was *leaving the job* while there were still *other* trucks to be checked." "The plaintiff and Cooke *walked away from the clock toward the gate at the pier exit* and during this time Cooke *demanded that the plaintiff return* to work", demanding "Get *back and punch the clock*". Plaintiff refused this demand and said "I am going home". Cooke then hit the plaintiff, who fell striking his head on the corner of the concrete walk, and was removed unconscious to St. Vincent's Hospital by ambulance (R. 4). (Italics ours).

"Cooke was never authorized by Kane, his superior, or anyone else in the employ of Moore-McCormack to strike or assault the plaintiff or anyone else" (R. 5).

But the parties specifically stipulated that "For the purposes of this trial it is conceded that *Cooke struck the plaintiff because the latter refused to return to work*" (R. 4). (Italics ours).

The Inherent Conclusions of Fact

No formal findings other than the stipulation were made. But the judgment on directed verdict on motion of both parties inherently involved ultimate findings of fact that:

(1) Petitioner was not an "employee" when injured. His prior employment under the daily "shape up" had been only for the day, already ended, and was terminated and further employment negatived:

(a) by his punching the time-clock, checking out and starting home after completion, following the end of the work day, of the overtime work agreed upon.

(b) by the dock boss (i) taking note that he was "leaving the job"; (ii) demanding "that the plaintiff return to work" and (iii) demanding "Get back and punch the clock".

(c) by petitioner's refusing and saying "I am going home".

(d) by the dock boss assaulting petitioner "because the latter refused to return to work" and as the "method" adopted "to try to force him" to agree to reemployment.

(2) Petitioner sustained the injury, not as an employee nor because he was employed, but as one who was *not* an employee and *because* he was not employed. The assault would not have been committed had he consented to be employed, and hence could not have been sustained because he was employed.

(3) The injury did not arise "out of" employment of petitioner, but arose "out of" his nonemployment, his refusal of employment, and Cooke's demand for, petitioner's refusal of and Cooke's effort to force petitioner into involuntary servitude of defendant.

(4) It did not arise "in the course of" employment of petitioner, but arose "in the course of" an assault committed by Cooke as a "method" he adopted to try to force petitioner into involuntary servitude of defendant.

(5) As either risk or injury it was not incidental to petitioner's past employment, but solely to a method adopted to try to force him to agree to a new employment.

(6) It was not "accidental" but was a "method" Cooke adopted on defendant's behalf to try to force petitioner, against his will, to serve defendant involuntarily.

(7) Cooke's method was adopted and his acts committed in the course and scope of Cooke's employment and in furtherance of defendant's business, and consequently were defendant's method and acts; Cooke's willfulness, purpose, method and acts were the willfulness, purpose, method and acts of defendant committed through Cooke.

The Basis of This Court's Jurisdiction

The jurisdiction of this Court is found in 28 U. S. Code, Secs. 1254(1) and 2101(c).

The judgment sought to be reviewed was rendered by the United States Court of Appeals, Second Circuit, and is dated April 30, 1952. Pursuant to Rule 28 of said Court of Appeals, petitioner duly filed a petition for rehearing on May 14, 1952 (R. 22), which that Court upon consideration thereof denied on June 10, 1952 (R. 31, 33).

The case involves fundamental and peculiarly Federal questions arising under the national Constitution, affecting the rights of every American freely to contract or to refuse to contract for his labor or services, to be protected against involuntary servitude, to enforce by action for damages in Federal Court indemnity for violation of his rights under the national Constitution and the common law of the state

when injured by assault admittedly committed in an effort to try to force him into involuntary servitude; the most fundamental questions of State law, but common to the Workmen's Compensation Laws of all States, Territories, Possessions and national fields alike, as to the meaning of "employer", "employee", and "accidental injuries arising out of and in the course of employment", both per se under such statutes and State court decisions and under the Thirteenth and Fourteenth Amendments of the national Constitution; the function of the Federal Courts in interpreting such laws and the common law of a State, and of a Federal Court of Appeals on reviewing on appeal a judgment rendered by a District Court determining such questions, including the questions of ultimate fact, questions of State law in accord with the statutes and court decisions of the State, and Federal questions in accord with the national Constitution; the effect of Rule 52, Fed. Rules Civ. Proc., to prevent reversal by a Court of Appeals as upon a different theory thereof unless that Court determine that the District Court findings were "clearly erroneous" (Rule 52(a)) or that the evidence was insufficient to support them (Rule 52(b)), and the effect in this connection of the parties stipulating facts and making a statement, under Rule 76, Fed. Rules Civ. Proc., of the case and of the facts and of the points to be relied on by the appellant; and whether reversal by a Court of Appeals without examining and determining but by-passing such questions violates the Constitutional requirements of due process and the Federal Rules of Civil Procedure as well as conflicts with applicable statutes, rules and controlling decisions.

The Constitutional provisions involved are the Thirteenth, Fourteenth and Fifth Amendments of the national Constitution. Federal statutes involved are the Rules of Decision statute, 28 U. S. C. sec. 1652, and the Civil Rights Code, 8 U. S. C. secs. 41, 43 and 56. The Federal Rules of Civil Procedure involved are Rules 52 and 76. The State laws involved are Art. I, sec. 18 of the New York State Constitution, and the common law and Workmen's Compensation Law of New York.

Questions Presented

A

1. Do the Thirteenth and Fourteenth Amendments of the national Constitution permit assault and battery as a method of compelling or trying to compel involuntary servitude, upon the coercer first securing under a State Workmen's Compensation Law insurance as "employer" to pay "employees" compensation for "accidental injuries arising out of and in the course of employment"?

Are injuries inflicted in such an attempt at coercion of involuntary servitude "accidental" injuries of an "employee" and "arising out of and in the course of employment", or tortious injuries inflicted in violation of the Thirteenth and Fourteenth Amendments and common law and to which a workmen's compensation law can have no exclusive applicability?

2. May "employment", reemployment, or the contract, status or relationship of "employer" and "employee", upon which the defense of a compulsory and exclusive State Workmen's Compensation Law is conditioned, be established, reestablished, renewed, continued, extended or exist:

(a) Without the consent and contrary to the refusal of the person whose services as "employee" are demanded?

(b) By unilateral demand of the corporation seeking to be "employer", and by its dock boss assaulting the workman as a "method" adopted "to try to force" him to agree to a contract of employment to which he is unwilling to agree and after, notwithstanding and "because the latter refused" to agree to the employment or servitude?

(c) By *ex post facto* judicial ruling of a Federal Court of Appeals forcing a plaintiff suing for assault and battery to accept *ex post facto* the very status of "employee" which he in fact had refused to accept and had suffered the

assault in refusing to accept; and by judicially converting *ex post facto* the assault and battery inflicted because he was *not* an employee into one sustained as because he *was* an employee?

3. May the limited applicability of a State Workmen's Compensation Law to "only accidental injuries arising out of and in the course of employment" of the injured person be extended by a Federal Court of Appeals to prevent recovery of and to reverse a judgment for damages at common law for injuries which under the facts stipulated by the parties and found by the Court indisputably arose (a) out of the injured person's *refusing* employment and refusing involuntary servitude after demand therefor, and (b) out of and in the course of an effort by defendant's dock boss on behalf of defendant to try by the method of assault to force the person assaulted to render involuntary servitude to defendant?

4. Whether assault and battery of an ex-employee of a corporation by its dock boss in charge of "shape up" hiring and supervising corporate employees, committed as a method adopted by the dock boss on the corporation's behalf to try to force the ex-employee to submit to involuntary servitude of the corporation is a risk of and an injury arising out of any past employment of the assaulted person, within a State Workmen's Compensation Law, or is a risk outlawed and protected against (a) by the common law, (b) by the Thirteenth Amendment of the national Constitution, and (c) by the Fourteenth Amendment thereof, as a matter of his larger and fundamental constitutional rights, and is an injury which arises out of a violation of such fundamental common law and constitutional rights, the legal remedy for which is unaffected by whether the corporation had or had not secured a policy of workmen's compensation insurance?

B

5. When a statement of the case is prepared, signed, approved and certified pursuant to Rule 76, Fed. Rules Civ. Proc., may the appellant urge and may the Court of Appeals assume as a basis for reversing a District Court judgment facts different from the facts stipulated and findings inherent in the judgment rendered below? May the appellee be precluded from sustaining the judgment by the facts stipulated, the findings inherently made and the controlling points of national Constitutional and State statutory and common law determined and applied in District Court?

6. When the action as submitted for decision in District Court involved primarily the issue whether, and the District Court judgment inherently involved finding or holding that plaintiff was not an "employee" of defendant when injured and that his injury did not arise "out of" nor "in the course of" his employment by defendant, within the meaning and effect of the New York Workmen's Compensation Law, and under the Thirteenth and Fourteenth Amendments of the national Constitution, may the Court of Appeals as a basis for reversal lawfully assume or assert the contrary that plaintiff was an employee and treat as the sole issue whether the injury was "accidental"?

7. May a Federal Court of Appeals ignore the issue and inherent findings of attempted forcing of involuntary servitude, and premise reversal on describing petitioner as "employed" and injured accidentally while leaving his employer's premises within *Martin* v. *Metropolitan Life Ins. Co.*, 197 App. Div. 382, affd. 233 N. Y. 653, notwithstanding the stipulated facts that petitioner was assaulted because he refused to be employed and as a method adopted to try to force him into involuntary servitude? May such an assault, of such a method, for such a purpose, be held an accident incident to the risks of safe exit of an ex-employee

from his ex-employer's premises, notwithstanding its being in direct violation of the Thirteenth and Fourteenth Amendments of the national Constitution?

8. Could the Court of Appeals lawfully assume or hold that plaintiff was an "employee" when injured and bypass whether the injury arose "out of" and "in the course of" employment but hold that it was "incidental" to employment, when the statement of the case pursuant to Rule 76 did not show any proof, concession or assertion that such were the facts? When it showed the contrary as facts? When the judgment appealed from inherently involved findings to the contrary by the District Court? When the contrary findings inherent in the District Court judgment are supported by the stipulated evidentiary facts embodied in the statement of the case; by the applicable State law; and by the applicable provisions of the Thirteenth and Fourteenth Amendments of the national Constitution? When the statement pursuant to Rule 76 does not assert nor establish that such findings were "clearly erroneous" (Rule 52(a)) or not supported by sufficient evidence (Rule 52(b))?

Could the Court of Appeals so assume or hold without deliberated consideration of the contrary findings inherent in the District Court judgment? Without considering whether the findings inherent in the District Court judgment are binding on appeal; are not "clearly erroneous" (Rule 52(a)) and the "sufficiency of the evidence to support the findings" (Rule 52(b))? Without deliberated consideration of the determination inherent in the District Court judgment of the applicable State law and the applicable provisions of the Thirteenth and Fourteenth Amendments, and whether or not the same were "clearly erroneous"? Without making any finding, holding or determination that the findings inherent in the District Court judgment were "clearly erroneous" (Rule 52(a)) or not supported by sufficient evidence (Rule 52(b))? Without

considering and determining whether the injury arose out of and in course of the attempt of defendant's dock boss to force petitioner into involuntary servitude of defendant, in violation of the Thirteenth and Fourteenth Amendments, instead of arising "out of" and "in the course of" any existing employment?

Reasons for Allowance of the Writ

A

1. The decision violates, and gives the New York Workmen's Compensation Law a meaning and effect which violates

(a) the Thirteenth Amendment of the national Constitution;

(b) the Fourteenth Amendment thereof;

(c) the Federal Civil Rights Code, 8 U. S. C., secs. 41, 43 and 56;

(d) the national Rules of Decision Statute, 28 U. S. C., sec. 1652.

2. It violates, conflicts with, misinterprets or fails properly to interpret and give effect to

(a) the New York State Constitution, Art. 1, sec. 18;

(b) the New York Workmen's Compensation Law, 64 Consol. Laws of New York, secs. 2, 10 and 11.

3. It misinterprets and misapplies *Martin* v. *Metropolitan Life Ins. Co.*, 197 App. Div. 382, aff'd 233 N. Y. 653, which merely holds that because an employer is bound to furnish a safe entrance and exit, the Workmen's Compensation Law applies to an accidental injury to an employee in leaving the elevator, during her luncheon hour, on a personal errand.

Assuming that this rule could apply to petitioner after he checked out and terminated employment in accordance with the "shape up" contract for the day (see cases contra in second paragraph of No. 7, infra), it nevertheless would relate only to those risks which like the *Martin* elevator risk were risks incident to safe exit; for only they could arise out of the terminated employment. But it was no more a risk incident to safe exit that petitioner's ex-employer should try by assault and battery to force him to return and agree to a new, involuntary servitude, than for an adjoining pier owner to try by the same method to force him to work for it. The only element in either case related to the exit would be the contemporaneous or coincident timing, which is inadequate. It conflicts with *Fazio* v. *Cardillo*, C. A. D. C., 109 F. 2d 835; *Matter of Scholtzhauer* v. *C. & L. Lunch Co.*, 233 N. Y. 12, 14-15; *Matter of Heitz* v. *Ruppert*, 218 N. Y. 148, and similar authorities establishing that contemporaneous occurrence is inadequate and that the injury must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and a natural incident directly connected therewith. To apply *Martin* v. *Metropolitan Life Ins. Co.* to the facts herein, therefore, would require holding that it is a natural risk, natural consequence and natural incident of every employment contract that after it shall have terminated the ex-employer shall attempt by assault and battery to force the ex-employee into involuntary servitude in violation of the Thirteenth and Fourteenth Amendments.

4. It conflicts with *Pollock* v. *Williams*, 322 U. S. 4; *Civil Rights Cases*, 109 U. S. 3; *Hodges* v. *U. S.*, 203 U. S. 1; *Clyatt* v. *U. S.*, 197 U. S. 207; *U. S.* v. *Reynolds*, 235 U. S. 133; *Bailey* v. *Alabama*, 219 U. S. 219; *Slaughter House Cases*, 16 Wall. (83 U. S.) 36; *The Case of Mary Clark*, 1 Blackf. (Ind. S. C.) 122; *Matter of Turner*, 1 Abb. U. S. Rep. 84; *Mitchell* v. *Stanolind Pipe Line Co.*, C. A. 10, 184 F. 2d 837; *Goldstein* v. *State of New York*, 281 N. Y. 396.

401; *Henderson* v. *Coleman*, 150 Fla. 185; *Peonage Cases, D. C. Ala.*, 123 Fed. 671, 680, and the meaning and effect they give to the Thirteenth Amendment and its provision that involuntary servitude shall not exist.

5. It conflicts with *Coppage* v. *Kansas*, 236 U. S. 1; *Truax* v. *Raich*, 239 U. S. 33; *N. Y. C. R. R. Co.* v. *White*, 243 U. S. 188; *Morehead* v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587; *Adair* v. *U. S.*, 208 U. S. 161; *Chas. Wolff Packing Co.* v. *Court of Industrial Relations, Kansas*, 262 U. S. 522; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Meyer* v. *Nebraska*, 262 U. S. 390; *Tennessee Coal Iron & R. R. Co.* v. *Muscoda Local No. 123*, 321 U. S. 590; *Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1; *Goldstein* v. *State of New York*, 281 N. Y. 396, 401; *Peo.* v. *Marcus*, 185 N. Y. 257; *Murray* v. *Union Ry. Co.*, 229 N. Y. 110; *Doran* v. *N. Y. City Ry. Co.*, 239 N. Y. 448; establishing that the right to work for money and freely to contract for one's personal employment is one of the rights of liberty and property guaranteed by the Fourteenth Amendment.

6. It conflicts with *Kackel* v. *Serviss*, App. Div. 3, 180 App. Div. 54; *Murray* v. *Union Ry. Co.*, 229 N. Y. 110; *Doran* v. *N. Y. City Ry. Co.*, 239 N. Y. 448; *Sweezey* v. *Arc Elec. Const. Co.*, 295 N. Y. 306; *Matter of Passarelli* v. *Columbia E. & C. Co.*, 270 N. Y. 68; *Clark* v. *Monarch Eng. Co.*, 248 N. Y. 107; *Matter of Beach* v. *Velzy*, 238 N. Y. 100; *Duffy* v. *Kedenburg*, App. Div. 3, 278 App. Div. 31; *Brassard* v. *Del. & Hud. Co.*, 186 App. Div. 647; *Lederson* v. *Cassidy*, 195 App. Div. 613, establishing that "employee" denotes a contractual relationship and that the existence of a voluntary contract of employment of the person injured is a jurisdictional condition precedent to applicability of the Workmen's Compensation Law to support either a compensation claim or a defense to an action for damages.

7. It conflicts with decisions establishing that a finding that the injury was one "arising out of and in the course

of employment" of the person injured is essential to an award of compensation or defense of the Workmen's Compensation Law (*Cardillo* v. *Liberty Mut. Inc. Co.*, 330 U. S. 469, 471; *Matter of Scholtzhauer* v. *C. & L. Lunch Co.*, 233 N. Y. 12; *Matter of Heitz* v. *Ruppert*, 218 N. Y. 148; *Saenger* v. *Locke*, 220 N. Y. 556; *DeFilippis* v. *Falkenberg*, 170 App. Div. 153, aff'd 219 N. Y. 581; *Greenberg* v. *Greenberg*, 193 App. Div. 574; *Barnes* v. *Chrysler Corp.*, D. C. N. D. Ill., 65 F. Supp. 806; *Cox* v. *Coal & Coke Co.*, 80 W. Va. 295; *Shoffler* v. *Lehigh Valley Coal Co.*, 290 Pa. 480; *Industrial Commission* v. *Bateman*, 126 Oh. St. 279; *Industrial Commission* v. *Ahern*, 119 Oh. St. 41; *Conrad* v. *Coal Co.*, 107 Oh. St. 387; *London & Lancashire Guarantee & Acc. Co.* v. *Industrial Acc. Com.*, 173 Cal. 642; *Fireman's Fund Indemnity Co.* v. *Industrial Acc. Com.*, 123 Cal. App. 142; *Waters* v. *Industrial Comm.*, 349 Ill. 214; *Lastuka* v. *Grand Trunk Pacific Ry. Co., Ltd.*, 6 Atla. 59; *Tyler* v. *Lowe*, C. C. A. 2, 138 F. 2d 867; *Raiche* v. *Standard Oil Co.*, C. C. A. 7, 137 F. 2d 446; *Lowe* v. *C. R. R. of N. J.*, 113 F. 2d 413) and clearly indicative that it could not properly be so found here.

It conflicts with decisions establishing that a compensation statute is inapplicable where the person injured either in fact was not employed at the time injured (*Brassard* v. *Del. & Hud. Co.*, 186 App. Div. 647; *Lederson* v. *Cassidy*, 195 App. Div. 613; *Noble* v. *Southland Lumber Co.*, 4 La. App. 281; *Cox* v. *Coal & Coke Co.*, 80 W. Va. 295) or where his employment had terminated or been abandoned before the injury (*Matter of Gifford* v. *Patterson, Inc.*, 222 N. Y. 4; *Jarrow* v. *Sabrier*, 5 La. App. 288; *Cox* v. *Coal & Coke Co.*, 80 W. Va. 295; *Shoffler* v. *Lehigh Valley Coal Co.*, 290 Pa. 480; *London & Lancashire Guarantee & Acc. Co.* v. *Industrial Acc. Comm.*, 173 Cal. 642; *Fireman's Fund Indemnity Co.* v. *Industrial Acc. Comm.*, 123 Cal. App. 142; *Waters* v. *Industrial Comm.*, 349 Ill. 214; *Lastuka* v. *Grand Trung Pacific Ry. Co. Ltd.*, 6 Alta. 59; *Industrial Comm.* v. *Bateman*, 126 Oh. St. 279; *Raiche* v. *Standard Oil Co.*, C. C. A. 7, 137 F. 2d 446). Compare *Corrina* v. *DeBarbieri*,

247 N. Y. 357, holding that mere departure from strict line of duty does not "conclusively" show the injury was outside employment, and *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, where, reversing the Court of Appeals, this Court sustained a finding by the Commissioner that a rescue attempt was not "necessarily excluded", although "We do not mean that the evidence *compelled* this inference."

8. It conflicts with decisions, applicable in determining whether employment of the injured person exists or has been terminated, establishing:

(a) that the Constitution protects and guarantees a person's right to refuse to be employed (*Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1, 8; *Goldstein* v. *State of New York*, 281 N. Y. 396, 401; *Adair* v. *U. S.*, 208 U. S. 161, 174, 175; *Green* v. *Samuelson*, 168 Md. 421; *Comm.* v. *Boston Transp. Co.*, 249 Mass. 477; *Murray* v. *Union Ry. Co.*, 229 N. Y. 110; *Doran* v. *N. Y. City Ry. Co.*, 239 N. Y. 448);

(b) that an employee, even where there is an existing contract, can elect at any time to break it and no law or force compels a continuance of the service (*Clyatt* v. *U. S.*, 197 U. S. 207, 215; *U. S.* v. *Reynolds*, 235 U. S. 133, 134; *The Case of Mary Clark*, 1 Blackf. (Ind. S. C.) 122; *Gillespie* v. *Peo.*, 188 Ill. 176; *Goldstein* v. *State of New York*, 281 N. Y. 396, 401);

(c) that one party cannot make a contract or new contract, nor extend a contract beyond what has been agreed upon (*Industrial & General Trust, Ltd.* v. *Todd*, 180 N. Y. 215, 225, applied to compensation jurisdiction in *Kackel* v. *Serviss*, App. Div. 3, 180 App. Div. 54); and

(d) that a contract cannot be implied in fact where the facts are inconsistent with its existence (*Miller* v. *Schloss*, 218 N. Y. 400, 406-407; *Grombach Productions* v. *Woering*, 293 N. Y. 609, 615; *Chinnery* v. *Kennosset Realty Co.*, 286 N. Y. 167, 173).

The stipulated facts that the daily "shape up" method of employment was used and that petitioner had checked out, was leaving for home, refused to be reemployed, and refused a demand that he "return" to work and "Get back and punch the clock" to commence a new employment, and that the dock boss assaulted petitioner "because the latter refused to return to work" (R. 4) are inconsistent with existing employment. They completely negative petitioner's agreeing to continue or renew the old or consent to a new employment, and completely negative the view that the assault was a risk of exit from his prior, terminated employment instead of an affirmative method to try to force him into new employment or involuntary servitude.

9. It conflicts with decisions establishing that the liability to secure and pay compensation—and the limitation of an injured employee exclusively to compensation—is a quasi contractual obligation imposed by reading the Workmen's Compensation Law into an employment contract (*Westchester L. Co.* v. *Westchester Co. Small Estates Corp.*, 278 N. Y. 175; 180; *Matter of Post & Gohlke*, 216 N. Y. 544, 553, 554; *Matter of Smith* v. *Heine Safety Boiler Co.*, 224 N. Y. 9), and rests upon the idea of status, is imposed as an incident to an employment contract, and is based upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured, and involves a necessary and causal relation between the existence of employment and the injury (*N. Y. C. Ry.* v. *White*, 243 U. S. 188, 203, 205; *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 423, 424, 426; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 157-158; *Alaska Packers Assn.* v. *Ind. Acc. Comm.*, 294 U. S. 532, 541; *Thom* v. *Sinclair* (1917) A. C. 127), as distinct from a causal relation between the *nature* of the employment and the injury (*O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504).

The stipulated facts here show that no employment contract, status or relationship existed and that the assault was occasioned by that fact and by petitioner's refusing to agree to one. Had petitioner agreed to be employed, the assault, committed "because (he) refused", would not have occurred. It therefore could not be because he was employed.

10. In treating the assault as "incidental" to past employment, it conflicts with all principles of proximate cause, natural consequence and direct connection, and with decisions establishing that where the whole occasion and efficient cause is an intervening one which acts as a nonconductor and belies any direct connection or natural relation with any prior risk the intervening efficient cause alone is controlling (*Matter of Scholtzhauer* v. *C. & L. Lunch Co.*, 233 N. Y. 12, 14-15; *Matter of Heitz* v. *Ruppert*, 218 N. Y. 148; *Brown* v. *N. Y. State Training School*, 285 N. Y. 37; *Hoffman* v. *N. Y. C. R. Co.*, App. Div. 3, 264 App. Div. 472; *Waters* v. *Merchants Louisville Ins. Co.*, 11 Pet. (36 U. S.) 213; *Saugerties Bank* v. *Del. & Hud. Co.*, 236 N. Y. 425; *Laidlaw* v. *Sage*, 158 N. Y. 73, 99).

The whole occasion and cause of the injury here was not the past, terminated, prior employment of petitioner, but the present nonexistence of employment, the petitioner's refusal to agree voluntarily to employment, the dock boss' demand and petitioner's refusal to consent involuntarily to reemployment, and the dock boss' adopting assault as a method to try to force petitioner into involuntary servitude of defendant. It was incident to, a natural consequence of and directly connected with, not the past, terminated, prior employment, but the present nonexistence of employment, and petitioner's refusal as a constitutional right either to agree to a new employment or consent to involuntary servitude.

11. It conflicts with decisions establishing that persons or corporations while violating the national Constitution are not entitled to the benefits of the Workmen's Compensation Law (*Matter of Swihura*, 242 N. Y. 523; *Herbold* v. *Neff*, App. Div. 3, 200 App. Div. 244). Certainly the Thirteenth and Fourteenth Amendments in this respect are not less fundamental than was the Eighteenth.

12. It conflicts with instead of applying *Osipoff* v. *City of New York*, 286 N. Y. 422, which it cited, and with other decisions (*Rounds* v. *Del. L. & W. R. R. Co.*, 64 N. Y. 129; *McLoughlin* v. *N. Y. Edison Co.*, 252 N. Y. 202; *DeWald* v. *Seidenberg*, 297 N. Y. 335; *Cohen* v. *Dry Dock, East Broadway & Battery R. R. Co.*, 69 N. Y. 170; *Durnelle* v. *N. Y. C. & H. R. R. Co.*, 120 N. Y. 117; *Mott* v. *Consumer's Ice Co.*, 73 N. Y. 543; *Oschenbein* v. *Shapley*, 85 N. Y. 214; *Palmeri* v. *Manhattan Ry. Co.*, 133 N. Y. 261; *Denver & Rio Grande Ry. Co.* v. *Harris*, 122 U. S. 597; *Daniels* v. *Tearney*, 102 U. S. 415; *Barnes* v. *Chrysler Corp.*, D. C. N. D. Ill. 65 F. Supp. 806) establishing that upon principles of (a) respondeat superior and (b) corporate responsibility for the acts of those through whom it operates, the defendant corporation is liable when its dock boss, having and exercising sole and exclusive authority from the corporation and control on its behalf, committed the assault for corporate objectives, for a corporate purpose and as a corporate method, rather than through personal animosity or for a personal purpose. His acts were its acts, his willfulness, purpose and method its willfulness, purpose and method; the violation of the Thirteenth and Fourteenth Amendments were by the corporation through action of its dock boss. The very principles which make the corporation responsible and liable therefor preclude treating the corporation as itself the innocent victim of an "accident".

13. It conflicts with decisions establishing that even where employment exists an assault committed upon an employee either by an employer (*Blake* v. *Head*, Eng. Ct. of

App., 5 B. W. C. C. 303, 304, 305; *Bock* v. *Wong Hing*, 180 Minn. 470; *Le Pochet* v. *Pendleton*, 187 Misc. 296) or for which the employer might be held liable under the principles of respondeat superior or corporate liability at common law (*Heskett* v. *Fisher Laundry & Cleaners Co., Inc.*, 217 Ark. 350; *DeCoigne* v. *Ludlum Steel Co.*, 251 App. Div. 662; *Lavin* v. *Goldberg Building Material Corp.*, 274 App. Div. 690; *DeLuca* v. *Coal Merchants Mutual Ins. Co.*, App. T. 1, 59 N. Y. Supp. 2d 664) cannot be held either "accidental" or to arise out of and in course of employment. Compare *Mazzaredo* v. *Levine and Davega-City Radios, Inc.*, 274 App. Div. 122, where plaintiff's own affidavit rejected respondeat superior, alleging that the assault had nothing to do with the employment of Levine, the servant who committed the assault.

14. It conflicts with decisions holding that where even an "employee" is assaulted by his "employer" in course of employment either he has no right to compensation but only a right to sue for damages at common law (*Blake* v. *Head*, Eng. Ct. of Ap., 5 B. W. C. C. 303, 304, 305) or has a right as against the employer to elect either to claim compensation or to sue for damages at common law (*DeCoigne* v. *Ludlum Steel Co.*, 251 App. Div. 662; *Bock* v. *Wong Hing*, 180 Minn. 470; *Heskett* v. *Fisher Laundry & Dry Cleaners Co.*, 217 Ark. 350).

The theory of election, insofar as it permits the assaulted employee to elect to claim compensation (contra, *Blake* v. *Head*, *supra*) notwithstanding common law responsibility of the employer for the assault and common law liability of the employer for damages therefor, rests apparently upon estoppel of the "employer" in such case to deny any of the elements essential to a compensation claim. It is doubtful whether this can apply where in fact there was no existing employment, and where the causal connection was, not with employment, but with the nonexistence of employment and the injured man's refusal to consent to employment. In

such case, moreover, the insurance carrier would not be similarly estopped nor barred from defending a compensation claim by questioning the existence and causal relationship of employment (*Matter of Passarelli* v. *Columbia E. & C. Co.*, 270 N. Y. 68; *Sweezey* v. *Arc Electrical Const. Co.*, 295 N. Y. 306; see also *Fitzgerald* v. *Harbor Lighterage Co.*, 244 N. Y. 132. Compare *Lanzetta* v. *Allied Decorating* Co., 261 App. Div. 861, affd. 287 N. Y. 570).

15. It conflicts with decisions holding that whether assault even of an employee by a co-employee may be held a risk of employment so as to entitle an assaulted person to claim compensation is a question of fact (*Parker* v. *Federal Steam Nav. Co., Ltd.*, 18 B. W. C. C. 469, 473; *Reid* v. *British & Irish Steam Packet Co.*, (1921) 2 K. B. 319, 327, 14 B. W. C. C. 20, 30; *Lee* v. *S. & J. Breckman, Ltd.*, 21 B. W. C. C. 32, 35-36; *Holden* v. *Premier Waterproof & Rubber Co., Ltd.*, 23 B. W. C. C. 460, 471).

16. It conflicts with decisions holding that assault by an employer or by agents for whose acts in committing the assault the employer is responsible and liable is not a risk of employment to which a workmen's compensation law can be held exclusively applicable (*Conway* v. *Globin*, 105 Cal. App. 2d. 495; *Barnes* v. *Chrysler Corp.*, D. C. N. D. Ill, 65 F. Supp. 806. See also *Matter of Brown* v. *N. Y. St. Training School*, 285 N. Y. 37; *Matter of Heitz* v. *Ruppert*, 218 N. Y. 152; *Matter of Connelly* v. *Samaritan Hospital*, 259 N. Y. 137).

Particularly is this true, therefore, of an assault committed in an attempt, in violation of the Thirteenth and Fourteenth Amendments, to force the person assaulted to consent to involuntary servitude.

17. It conflicts with *Jones* v. *Herbert Equities, Inc.*, App. T. 1, 186 Misc. 163, affd. 270 App. Div. 922, holding that in "borderline cases", even where employment exists, while "liberal construction" should be given "to enable the injured

employee to obtain compensation", the employee is also entitled to "liberal construction" to sustain a recovery of damages at common law.

In *Hartford Accident & Indemnity Co.* v. *Cardillo*, C. A. D. C., 112 F. 2d. 11, 15, the Court pointed out:

"Confusion and conflict still reign in these realms".

B

18. It conflicts with *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257; *Grant* v. *Leach & Co.*, 280 U. S. 351; *Buzynski* v. *Luckenbach Steamship Co.*, 277 U. S. 226; *Gerdes* v. *Lustgarten*, 266 U. S. 321; *Brown* v. *Fletcher*, 237 U. S. 583; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673; *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364; *Fowle* v. *Alexandria*, 11 Wheat (24 U. S.) 320; *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792; *Lonergan* v. *United States*, 303 U. S. 33, in reversing plaintiff's judgment without review and determination of the points in accord with the facts on which it was based and which fully sustain it, thereby depriving plaintiff of his judgment without due process of law.

19. The decision violates Rule 52, Fed. Rules Civ. Proc., and Rule 76 thereof and the agreed statement prepared and signed by the parties and approved by the District Court pursuant to Rule 76, by in effect setting aside District Court findings notwithstanding that the same were not "clearly erroneous" (Rule 52(a)), notwithstanding the clear "sufficiency of the evidence to support the findings" of the District Court (Rule 52(b)), and notwithstanding the agreed statement fully supports the same, does not assert otherwise and does not assert nor establish different ultimate facts (Rule 76; cf. *U. S.* v. *Foster*, CCA 8, 123 F. 2d. 32).

Formal findings of the ultimate facts deducible from the stipulated facts were not required (*Jones* v. *N. Y. C. R. Co.*, CA 6, 182 F. 2d. 326, cert. denied 340 U. S. 850; and Rules

52 and 76). But the District Court judgment nevertheless involved inherent findings of ultimate facts (1) that petitioner was not an "employee" of defendant when injured; (2) that the assault was committed, not because petitioner *was* but because he was *not* an employee and refused employment; (3) that the injury did not arise out of employment of petitioner, but out of his nonemployment, his refusal of employment and an assault committed as a method adopted to try to force him into involuntary servitude of defendant; (4) that it did not arise in the course of employment of petitioner, but in the course of an assault committed as a method adopted to try to force him into involuntary servitude of defendant; and (5) that it was not "accidental", but was methodical, by assault committed as a method adopted to try to force petitioner into involuntary servitude of defendant.

The Court of Appeals decision does not directly examine and set aside these inherent findings, nor examine the evidentiary facts supporting the same nor determine whether they are sufficiently supported thereby or are "clearly erroneous". But, ignoring these inherent findings and the clear support thereof by the stipulated evidentiary facts, it erroneously describes petitioner as "employed by the appellant" and holds that the injury was "incidental to his employment" because it occurred while he "was leaving his employer's premises to go home", that the sole issue was whether the cause was "accidental", and that the result was "accidental" because it "was, insofar as the appellant was concerned, something neither intended nor expected".

It thus in effect sets aside the District Court's findings without either noting them or considering or determining the sufficiency of the evidence to support them or whether they were "clearly erroneous", or whether the failure of the agreed statement to assert or establish that they were "clearly erroneous" or to assert, recite or establish different ultimate facts required the Court of Appeals to accept the version of ultimate facts and conclusions most favorable to petitioner including those inherent ones set forth above.

20. It conflicts in this respect directly with *United States* v. *Foster,* CCA 8, 123 F. 2d. 32, holding that where an agreed statement under Rule 76 did not assert or establish facts essential to reversal and contrary to those apparently inherent in the judgment below, such could not be deemed facts and it could not be held that the judgment below was "clearly erroneous".

21. It conflicts with decisions of this Court holding that the questions whether or not an injury arose out of and in the course of employment are questions of fact the determination of which by the District Court should be accepted by the Court of Appeals (*Parker* v. *Motor Boat Sales,* 314 U. S. 244; *Cardillo* v. *Liberty Mutual Ins. Co.,* 330 U. S. 469; *O'Leary* v. *Brown-Pacific-Maxon,* 340 U. S. 504).

22. It conflicts directly with this Court's decision in *United States* v. *Gypsum Co.,* 333 U. S. 364, reh. denied 333 U. S. 869, holding that Rule 52(a) is applicable to trial Court's inferences drawn from documents or undisputed facts and that such inferences cannot be set aside unless "clearly erroneous". See also *L. A. Wood & Co.* v. *Taylor,* CCA 5, 154 F. 2d. 548, and *Hyde* v. *Booraem,* 16 Pet. (41 U. S.) 169.

23. It conflicts with decisions of other circuits holding that findings were binding and could not be ignored or set aside unless "clearly erroneous" (*Anderson* v. *St. Louis Terminal Warehouse,* CA 5, 173 F. 2d. 436; *Wolfe* v. *Phillips,* CA 10, 172 F. 2d. 481, cert. denied 336 U. S. 968; *Doyle* v. *Division No. 1127 Amalgamated Assn.,* CA 5, 168 F. 2d. 876; *Order of Ry. Conductors of America* v. *Swan,* CCA 7, 152 F. 2d. 325, affd. 329 U. S. 520; *Andrew Jergens Co.* v. *Comm.,* CCA 6, 125 F. 2d. 686; *Lindquist* v. *Dilkes,* CCA 3, 127 F. 2d. 21; *Matson Nav. Co.* v. *Hanson,* CCA 9, 132 F. 2d. 487; *Universal Pictures Co., Inc.,* v. *Cummings,* CCA 9, 150 F. 2d. 986; *Dize* v. *Maddrix,* CCA 7, 144 F. 2d. 584, affd. 324 U. S. 697; *United States* v. *Foster,* CCA 8, 123 F. 2d. 32; *Chicago & N. W. Ry. Co.* v. *Froehling Supply Co.,* CA 7,

179 F. 2d. 133; *First Nat. Bank of Colorado Springs* v. *McGuire*, CA 7, 184 F. 2d. 620; *Jones* v. *N. Y. C. R. Co.*, CA 6, 182 F. 2d. 326, cert. denied 340 U. S. 850; *Brinck's Inc.* v. *Hoyt*, CA 8, 179 F. 2d. 355; *Rollingwood Corp.* v. *C. I. R.*, CA 9, 190 F. 2d. 263; *Liberty Mutual Ins. Co.* v. *Thompson*, CA 5, 171 F. 2d. 723).

It conflicts in this respect also with prior decisions of the Second Circuit itself (*Tyler* v. *Lowe*, 138 F. 2d. 867; *United States Nav. Co.* v. *Black Diamond Lines*, 147 F. 2d. 958; *Corbett* v. *Halliwell*, 123 F. 2d. 331, cert. denied 315 U. S. 818; *Caron Corp.* v. *Ollendorf*, 160 F. 2d. 444, cert. denied 332 U. S. 765).

24. It conflicts with decisions holding that where both parties move for a directed verdict the facts are concluded in favor of the party whose motion is granted in District Court, and all inferences are required to be drawn in his favor (*Beuttell* v. *Magone*, 157 U. S. 154; *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364; *C. & O.* v. *Martin*, 283 U. S. 209). To the extent that this may be modified by the Federal Rules of Civil Procedure, Rule 52 makes such findings and inferences conclusive unless "clearly erroneous".

25. It conflicts with *Abbott* v. *Arkansas Utilities Co.*, CCA 8, 165 F. 2d. 339, 340, and *Mogis* v. *Lyman-Richey Sand & Gravel Corp.*, CCA 8, 189 F. 2d. 130, 134, holding that a District Court's determination of State law should be accepted by the Court of Appeals and should not be overruled unless "clearly erroneous"; with *Reitz* v. *Mealey*, 314 U. S. 33, 39, holding that "great weight" was to be accorded "to the District Court's view of New York law"; with *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280, where this Court deferred to a District Court's opinion of State law affirmed below; and with *Hawks* v. *Hamill*, 288 U. S. 52, holding that State court decisions are to be followed including considered dictum if the precise point has not been squarely decided.

C

26. Throughout the United States "the vast majority of persons" work for a living (*Coppage* v. *Kansas*, 236 U. S. 1, 14). Countless numbers are casual workers, having at any time either no contract or an oral or time-clock or brass check contract for only a day, a shift or an hour. Their only contact with an "employer"—particularly in the case of large corporations—is with some "boss" placed by the corporation in charge of hiring and supervising them for the day, shift or hour, and with a time keeper and paymaster.

The estimated 40,000 to 50,000 longshoremen and checkers in the Port of New York (*The Waterfront Labor Problem*, Edward E. Swanstrom, Ph.D., Fordham University Press, p. 8), are "perhaps the best example" of casual laborers (*Id.*, p. 21), and "longshore work the most casual of industries" (*Id.*, p. 23), although agriculture, lumber camps, metal mining and railroad maintenance and construction have large numbers of casual laborers (*Id.*, p. 21). See also *Cox* v. *Coal & Coke Co.*, 80 W. Va. 295, where a "day laborer" coal miner (p. 296) was injured on a day when he reported too late for work that day; and *Jarrow* v. *Sabrier*, 5 La. App. 288, where a workman was injured after unloading a railroad car, and while awaiting possibility of being hired for other cars; the Workmen's Compensation Law being held inapplicable in either case.

Longshoremen and checkers on the New York waterfront are commonly employed by "shape up", for the shift or day, as stipulated herein (R. 3, pars. 5-8). Since publication of *The Longshoreman* (Charles R. Barnes, N. Y. Survey Associates, Inc., 1915), much has been and continues to be written on the evils of the "shape up" (see, e. g., *The Waterfront Labor Problem, supra*, particularly pp. 7-8, 21, 23, 25, 26, 27, 32, 37; *Crime on The Labor Front*, Malcolm Johnson, McGraw-Hill Book Co., Inc., pp. 91, 95, and particularly ch. 10 "The Shape-up, a Hiring Method",

pp. 133-149, 153-154; *"The Pirates' Nest of New York," Harper's Magazine,* April, 1952, pp. 27-37, at p. 29; *"A Waterfront Priest Battles the Big Port's Big Boss," Collier's Magazine,* February 16, 1952, pp. 18-19, 56-60, at p. 56; *"Red Skies Over the Water Front," Collier's Magazine,* October 5, 1946; *"Two Ways to Hire Casual," Business Week,* March 19, 1949; *"Last of the Business Rackets," Fortune Magazine,* June, 1951; *Final Report to The Industrial Commissioner, State of New York, from Board of Inquiry on Longshore Industry Work Stoppage October-November, 1951, Port of New York,* January 22, 1952, pp. 38, 45, 48-50, 59-60; *Matter of Burger,* App. Div. 3, 277 App. Div. 234, affd. 303 N. Y. 654.

"The keystone of the job market structure is the 'shape-up.' • • • From among those who congregate in a semi-circle at his pier *each day,* the hiring boss selects those whom he wants if there is work at hand. • • • *the hiring boss is placed in a position of great power" (Final Report to the Industrial Commissioner, State of New York, supra,* p. 45). A "shape-up" hiring guarantees only four hours work, and the men must be notified during a shift if they are to be *"re-employed"* for the following shift or for overtime (*Id.,* summary of collective agreement, pp. 38-39). "Their destiny for the time is entirely in the hands of the hiring foreman" (*The Waterfront Labor Problem, supra,* p. 27). "This *concentration of power in the hands of the hiring foreman* is but another of the unwholesome features of the absence of an adequate system of registration and hiring" (*Id.,* p. 37). "Under this system *the hiring boss has the power of life and death* over the longshoremen. He controls their economic life and sometimes their physical life, for many of the hiring bosses have criminal records. Some stevedoring companies prefer such men" (Harper's Magazine, April, 1952, supra, at p. 29; see also *Final Report to the Industrial Commissioner, State of New York, supra,* p. 28).

The emphasis by the writers, however, heretofore has been on the absolute authority of the hiring boss to pass over yesterday's veteran whose needs did not enable him to pay a bribe, and select instead a novice who is willing to pay a "kick-back."

By contrast, the Court of Appeals decision herein introduces, paradoxically, and would in a practical sense give quasi-legalization to a further evil, the reverse of and greater than those agitated in the above writings. For it involves practically legalizing a new form of *forced labor* or involuntary servitude—a form of coerced workmen's compensation peonage. If sustained herein, the effect of the precedent would not be confined to the metropolitan water front, nor even to the casual laborer, but would affect all that "vast majority of persons" (*Coppage* v. *Kansas, supra*) who work for a living—and even possibly persons who customarily now do not work.

Since adoption of the Thirteenth and Fourteenth Amendments in 1865 and 1868 this Court has uniformly held invalid all forms of involuntary servitude, whether traditional peonage or ingenious and limited substitutes, such as in *U. S.* v. *Reynolds*, 235 U. S. 133 and *Pollock* v. *Williams*, 322 U. S. 4. The Federal Courts particularly have been astute to protect against use of State laws of any sort to shield or support involuntary servitude, with Federal District Courts and Federal Courts of Appeals refusing to follow, and this Court repeatedly reversing decisions of the highest State courts sustaining such laws.

Now the opposite occurs. With a State Constitution and Workmen's Compensation statute carefully limiting the statute's operation to cases of "employees"—only when, therefore, they have voluntarily contracted to be "employees" subject to the statute—and to "only accidental injuries arising out of and in the course of employment" voluntarily contracted for; and with the State Court decisions establishing that a voluntary contract of employment is a jurisdictional condition precedent to applicability of the statute (*Kackel* v. *Serviss*, App. Div. 3, 180 App.

Div. 54, and cases cited supra, par. 6), and with a Federal District Court judgment rendered herein accordingly, the Federal Court of Appeals has reversed and held that a corporation's dock boss, with unlimited authority as to recruiting and supervising workers on the corporation's behalf, may use his authority and physical power to coerce or attempt to coerce an unwilling person into involuntary servitude by methodical assault and battery, and that a workmen's compensation law will serve to shield the corporation from an action for damages—if it has first obtained a policy of insurance to cover compensation to its "employees" for "accidental injuries arising out of and in the course of the employment." Even when the efforts of the dock boss to coerce were unsuccessful, and the assaulted petitioner was beaten insensible while still refusing employment, the workmen's compensation law is held exclusively applicable, with the insensible person treated as an "employee" despite his refusal.

With such a precedent, the limited schemes considered in *U. S.* v. *Reynolds* and *Pollock* v. *Williams* were but needlessly disingenuous, subtle and labored. Instead, direct methodical asault may be employed at the cost only of a compensation insurance premium. To at least the casual laborer, the theory of a right to resort to criminal prosecution of an individual would weigh little in electing whether to labor involuntarily on whatever terms the "boss" dictated or suffer the methodical beating for which he could obtain no civil redress except a compensation claim based on whatever wage scale the "boss" may have demanded that he punch in for. In these circumstances, both the Thirteenth and Fourteenth Amendments become in every practical respect meaningless to the person assaulted "to try to force" him to agree to involuntary servitude after refusing to agree to voluntary service.

A review of the decision and its reversal is of vital importance, not merely as a matter of justice to this unfortunate petitioner, but to the citizenship of the country as a

whole and the preservation unimpaired of their most cherished Constitutional privileges of bargaining freely for their labor.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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RICHARD J. MCANANY,
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CHARLES ANDREWS ELLIS,
HARRY D. GRAHAM,
RICHARD J. MCANANY,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

FRANK A. WHITTINGTON,
Petitioner,

against

MOORE-MCCORMACK LINES, INC.,
Respondent.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI

Statement and summary of the case, including the facts, are set forth in the petition preceding.

Opinion Delivered Below

No opinion was delivered in District Court. The Per Curiam opinion of the Court of Appeals is published at 196 F. 2d 295.

Grounds for Jurisdiction

Grounds for jurisdiction have been stated in the Petition, both under "The Basis of This Court's Jurisdiction" and in detail in "Reasons for Allowance of the Writ." They include:

1. The most fundamental questions, not only under the New York Workmen's Compensation law, but under the Thirteenth and Fourteenth Amendments of the national Constitution, the Rules of Decision statute, 28 U. S. C. sec.

1652 and the Civil Rights Code, 8 U. S. C. secs. 41, 43 and 56, whether the contract or status of employment, essential to applicability of the Workmen's Compensation Law, can be made or established and imposed on a workman by unilateral demand of a corporation and by assault and battery by its dock boss, having sole authority over recruiting and supervising workmen for the corporation, and committed because petitioner was not employed, refused to be employed, refused to agree to involuntary servitude, and as a method adopted by the dock boss to try to force petitioner into involuntary servitude of the corporation; and whether, after contrary determination by the District Court, such involuntary contract or status of "employment" can be imposed upon petitioner, *ex post facto*, by a Federal Court of Appeals, and a State Workmen's Compensation Law be held exclusively applicable, to deprive petitioner of his judgment for damages for assault committed as a method to try to force him into involuntary servitude in violation of the Thirteenth and Fourteenth Amendments.

It presents, apparently for the first time in this Court, the question specifically whether the Thirteenth and Fourteenth Amendments permit a State Workmen's Compensation Law to be used as a shield and license for adopting assault and battery as a method of forcing or trying to force a person into involuntary servitude, although, as shown in the Petition, the decision conflicts in this respect with numerous decisions of this and other Courts holding that other types of State laws may not be used to occasion, shield or permit involuntary servitude.

2. Important and fundamental questions as to appellate jurisdiction and power and due process of law in Federal Appellate Courts; the effect of findings of fact and determination of State law questions inherent in a District Court judgment, rendered on verdict directed as to liability on motion of both parties, and the effect of stipulated facts and

Agreed Statement of the Case made under Rule 76, Fed. Rules Civ. Proc., and the necessity of accepting the District Court's findings and determination unless ruled "clearly erroneous" (Rule 52(a)) upon examining the "sufficiency of the evidence to support the findings" (Rule 52(b)); the lack of jurisdiction to reverse as upon different assumed or recited facts not asserted nor established by the Statement under Rule 76 and without any presentation and review of such questions and without any determination that the contrary inherent findings and determination below were "clearly erroneous"; and the peculiar applicability thereof to inherent District Court findings that petitioner was not an "employee" when injured, and that his injury was not an "accidental injury arising out of and in the course of employment" within the New York statute and the Thirteenth and Fourteenth Amendments of the national Constitution, but that he was injured, after termination of a prior employment relationship, by assault committed on defendant's behalf as a method to try to force him into involuntary servitude of defendant.

The State Statute

The *New York Workmen's Compensation Law* pleaded and relied on by defendant (and by the Court of Appeals herein) was enacted pursuant to provision of the New York State Constitution (Art. 1, sec. 18) authorizing enactment of laws for protection of the lives, health and safety of and for payment of compensation for injuries to "employees".

The statute prescribes a liability of every "employer" to secure compensation to his "employees" and to pay or provide compensation for "their" disability from injury "arising out of and in course of the employment" (*New York Workmen's Compensation Law*, 64 McKinney's Consolidated Laws of New York, sec. 10), and provides that such liability shall be exclusive and in place of any other liability whatsoever to such "employee" on account of "such injury" (*Id.*,

sec. 11), and defines "injury" to mean "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom" (*Id.*, sec. 2, par. 7).

United States Constitutional Provisions

The Thirteenth Amendment provides:

> "Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction".

The Fourteenth Amendment provides:

> "Sec. 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * * "

United States Statutory Provisions

The Rules of Decision Statute, 28 U. S. C. sec. 1652, provides:

> "The laws of the several States, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply".

The Civil Rights Code, 8 U. S. C. secs. 41, 43 and 56 provide:

> "41. All persons within the jurisdiction of the United States shall have the same right in every State and

Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other".

"43. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding, for redress".

"56. Peonage abolished. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void".

Assignments of Error

The Court of Appeals, Second Circuit, erred:

1. In assuming or holding that petitioner was an "employee" of defendant corporation when injured, and in failing to recognize and hold that under the stipulated facts his "employment" had wholly terminated and was not a cause of his assault and injury, and that the District Court had so found.

2. In holding that the assault and injury was incidental to petitioner's former employment and within the coverage of the New York Workmen's Compensation Law because

it occurred while he was leaving defendant's premises to go home.

3. In assuming or holding that the risk of assault and battery as a method to try to force petitioner into rendering involuntary servitude to defendant is a risk of employment and of exit from defendant's premises upon termination of employment and citing *Martin* v. *Metropolitan Life Ins. Co.*, 197 App. Div. 382, affd. 233 N. Y. 653, as comparable; and in failing to hold that the risk of such an assault for such a purpose is, by contrast, a risk outlawed and protected against by the Thirteenth and Fourteenth Amendments of the national Constitution.

4. In holding that the sole issue presented was whether the cause of petitioner's injuries was "accidental", and that the assault was "accidental" within the Compensation law.

5. In failing to consider whether and hold that an interpretation of the Workmen's Compensation Law as exclusively applicable to plaintiff's injury would give such law a meaning and effect violative of:

(a) the Thirteenth Amendment of the national Constitution;

(b) the Fourteenth Amendment thereof;

(c) the Rules of Decision statute, 28 U. S. C., sec. 1652;

(d) the Civil Rights Code, 8 U. S. C. secs. 41, 43 and 56.

6. In failing to consider whether and hold that findings were inherent in the District Court judgment that petitioner was not an employee when injured, and that the injury was not an accidental injury arising out of and in course of any employment of petitioner; and that such findings were supported by the stipulated evidentiary facts, were not "clearly erroneous", and were binding and correct.

7. In failing to consider whether and hold that the District Court's interpretation of the New York law was not "clearly erroneous", was supported by the New York statute and decisions, and was binding and correct.

POINT I

A State Workmen's Compensation Law cannot be used as a shield for assault and battery committed as a method to try to force petitioner to render involuntary servitude to defendant.

The Thirteenth Amendment provides that involuntary servitude shall not exist. The Fourteenth Amendment prevents deprivation of liberty or property without due process of law. This includes the right freely to contract for one's labor which "is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure" (*Truax* v. *Raich*, 239 U. S. 33, 41; *N. Y. C. R. R. Co.* v. *White*, 243 U. S. 188, 206). "Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense" (*Coppage* v. *Kansas*, 236 U. S. 1, 14; *N. Y. C. R. R. Co.* v. *White, supra*, 243 U. S. 188, 206).

The Thirteenth Amendment "is undoubtedly self-executing" (*Civil Rights Cases*, 109 U. S. 3, 20). Its "meaning * * * is as clear as language can make it" (*Hodges* v. *U. S.*, 203 U. S. 1, 16).

The Civil Rights Code, 8 U. S. C., moreover provides, in sec. 41, that "All persons * * * shall have the same right * * * to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property * * * "; in sec. 43, that anyone shall be liable to the party injured who "under color of any statute,

* * * custom, or usage, * * * subjects, or causes to be subjected, any * * * person * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, * * * *"; and sec. 56 makes null and void "all acts, laws, * * * or usages * * * to * * * enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, * * * or otherwise, * * *."

A man has a constitutional right to refuse to be employed (*Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1, 8; *Goldstein* v. *State of New York*, 281 N. Y. 396, 401; *Adair* v. *U. S.*, 208 U. S. 161, 174, 175; *Murray* v. *Union Ry. Co.*, 229 N. Y. 110; *Doran* v. *N. Y. City Ry. Co.*, 239 N. Y. 448) or, having made a contract for services "can elect at any time to break it, and no law or force compels performance or a continuance of the service" (*Clyatt* v. *U. S.*, 197 U. S. 207, 215; *U. S.* v. *Reynolds*, 235 U. S. 133, 144. See also *The Case of Mary Clark*, 1 Blackf. (Ind. S. C.) 122, 125; *Gillespie* v. *Peo.*, 188 Ill. 176; *Goldstein* v. *State of New York, supra*).

"Shape-up" contracts moreover, are only for the day; and petitioner's contract had been completely terminated (*Matter of Burger*, 277 App. Div. 234, affd. 303 N. Y. 654; see also *Cox* v. *Coal & Coke Co.*, 80 W. Va. 295; *Jarrow* v. *Sabrier*, 5 La. App. 288).

One party cannot make a contract or new contract, nor extend a contract beyond what has been agreed upon (*Industrial & General Trust Ltd.* v. *Todd*, 180 N. Y. 215, 225; *Kackel* v. *Serviss*, App. Div. 3, 180 App. Div. 54, applying the *Todd* case to a compensation case).

A contract cannot be implied in fact where the facts are inconsistent with its existence (*Miller* v. *Schloss*, 218 N. Y. 400, 406-407; *Grombach Productions* v. *Woering*, 293 N. Y. 609; 615; *Chinnery* v. *Kennosset Realty Co.*, 286 N. Y. 167, 173).

The existence of a voluntary contract of employment is a jurisdictional condition precedent to applicability of a workmen's compensation law (*Kackel* v. *Serviss, supra; Murray* v. *Union Ry. Co.*, 229 N. Y. 110; *Doran* v. *N. Y. City Ry. Co.*,

239 N. Y. 448; *Sweezey* v. *Arc Elec. Const. Co.*, 295 N. Y. 306; *Matter of Passarelli* v. *Columbia E. & C. Co.*, 270 N. Y. 68; *Clark* v. *Monarch Eng. Co.*, 248 N. Y. 107; *Matter of Beach* v. *Velzy*, 238 N. Y. 100; *Duffy* v. *Kedenburg*, 278 App. Div. 31; *Brassard* v. *Del. & Hud. Co.*, 186 App. Div. 647; *Lederson* v. *Cassidy*, 195 App. Div. 613).

An existing employment itself must be the related and primary cause. As said in *Thom* v. *Sinclair* (1917), A. C. 127, 135, "Now it is to be observed that it is the *employment* which is pointed to as to be the distinctive *cause*, * * *. The condition is that the *employment* is to give rise to the circumstance of injury by accident * * *. Has the accident arisen *because the claimant was employed* in the particular spot * * *?" (Italics ours.) In *N. Y. C. R. Co.* v. *White*, 243 U. S. 188, this Court said: "the Act in effect * * * looks to * * * the *primary cause*, as it may be deemed—and that is, the *employment itself*. For this, *both* parties are responsible since they *voluntarily engaged in it* as coadventurers, with personal injury to the employee a probable and foreseen result" (243 U. S. 205). (Italics ours.)

Thus (1) under the Compensation Law a voluntary contract of employment is a jurisdictional prerequisite, and the voluntary employment itself must be the distinctive and and primary cause, and (2) under the Thirteenth and Fourteenth Amendments employment cannot exist or continue without the voluntary consent of the "employee".

But the Court of Appeals decision herein would eliminate and reverse both these fundamental points. For, where petitioner admittedly refused employment, and was beaten *because* he refused employment, and as a method adopted to try to force him to consent to reemployment against his will, the Court of Appeals nevertheless holds that he was an "employee" and that the assault itself was incidental to his employment.

The Court of Appeals did not expressly consider whether the injury arose "out of" and "in the course of" employment, although a finding of both is essential to applicability of the Compensation Law (*Cardillo* v. *Liberty*

Mutual Ins. Co., 330 U. S. 469, 471; *Matter of Scholtzhauer* v. *C. & L. Lunch Co.*, 233 N. Y. 12; *Matter of Heitz* v. *Ruppert*, 218 N. Y. 148; *Saenger* v. *Locke*, 220 N. Y. 556, and cases cited under No. 7 of Reasons for Allowance of the Writ, *supra*).

If by its holding that the assault was "incidental" to employment it meant that it arose "out of" and "in the course of" employment, it violates all the foregoing principles as well as all principles of proximate cause.

There could be no proximate relation between petitioner's prior employment and the assault, because, after the employment was terminated, the subsequent intervening demand that petitioner agree to reemployment, his refusal, and the use of assault as a method to try to force him to render involuntary servitude were themselves completely independent causes and a non-conductor which belied any causal relationship of his prior, terminated employment (Cf. *Matter of Scholtzhauer* v. *C. & L. Lunch Co.*, 233 N. Y. 12, 14-15; *Matter of Heitz* v. *Ruppert*, 218 N. Y. 148; *Brown* v. *N. Y. State Training School*, 285 N. Y. 37; *Hoffman* v. *N. Y. C. R. R. Co.*, 264 App. Div. 472; *Waters* v. *Merchants Louisville Ins. Co.*, 11 Pet. (36 U. S.) 213; *Saugerties Bank* v. *Del. & Hud. Co.*, 236 N. Y. 425; *Laidlaw* v. *Sage*, 158 N. Y. 73, 99).

In *Blake* v. *Head*, 5 B. W. C. C. 303, Cozens-Hardy, M. R., said:

> "Personally, I do not think this was an 'accident' at all. I think it was an intentional felonious act, and the injury certainly did not arise out of employment. * * * *I cannot think why the unfortunate boy did not bring an action for assault.* I do not think it was an accident, or that the injury arose out of and in the course of the employment" (5 B. W. C. C. 304). (Italics ours.)

Buckley, L. J., said:

> "A felonious act done by the employer cannot by any possible straining of language be called an acci-

dent arising out of and in the course of the employment" (5 B. W. C. C. 305).

In *Matter of Scholtzhauer* v. *C. & L. Lunch Co., supra*, "The murder, however, arose not out of the employment, but *because* the deceased *refused* to accept Arthur's invitation"; whereas, for the Act to apply, the "injury must be a *natural incident* to the work. *It must be one of the risks connected with the employment, flowing therefrom as a natural consequence* and directly connected with the work" (233 N. Y. 14, 15). (Italics ours.)

For identical reasons of proximate relationship, the stipulated fact that the assault here was *because* petitioner *refused* a new employment and was a *method to try to force him into involuntary servitude of defendant* makes it impossible to hold that it arose "out of" his prior, terminated employment. It occurred in course of *Cooke's* employment, but *not* out of nor in course of any employment of *petitioner*.

The very proposition that it was "incidental" to petitioner's prior, terminated employment involves the impossible theory that assault by an ex-employer or committed in the interest and on behalf of the ex-employer and for which the ex-employer is responsible is a risk of employment (*Conway* v. *Globin*, 105 Cal. App. 2d 495; *Barnes* v. *Chrysler Corp.*, D. C. N. D. Ill., 65 F. Supp. 806; *Blake* v. *Head*, Eng. Ct. of Ap., 5 B. W. C. C. 303, 304, 305; *Boek* v. *Wong Hing*, 180 Minn. 470; *Heskett* v. *Fisher Laundry & Dry Cleaners Co.*, 217 Ark. 350), and this, notwithstanding the Thirteenth and Fourteenth Amendments and the admitted fact that here the prior employment had terminated and the assault was a method adopted to try to force petitioner into involuntary re-employment and servitude.

Conway v. *Globin*, 105 Cal. App. 2d 495, held that assault by an employer even on an employee "while he was engaged in the performance of his duties as an employee of the defendant" nevertheless "is not a risk or condition of the employment, and hence not one arising out of the employment", saying:

> "To so hold would be not only to sanction indirectly conduct of the employer which is both tortious and criminal, but also would be to permit the employer to use the Workmen's Compensation Act to shield him from his larger civil liability, which liability would exist independent of the common law defense to personal injury actions by employees which prevailed prior to the advent of the Workmen's Compensation Act."

Here, it would be to permit a corporate *ex*-employer to use the Compensation Act to shield it from liability for violation of the most fundamental constitutional rights of petitioner under the Thirteenth and Fourteenth Amendments—as a shield, in fact, for enforcing involuntary servitude.

As said in *Henderson* v. *Coleman*, 150 Fla. 185, 196, 197:

> "We are not advised of any rule of law under which any man in this country will be forced to serve with his labor any other man whom he does not wish to serve.
>
> "• • • We think it will not be contended that any member of the local could be committed to jail for *refusing* to load or unload the 'Collins' trucks. That service required the performance of manual labor and it is beyond the power of courts to punish one by imprisonment for failure to engage in involuntary servitude." (Italics ours.)

But when the State will not directly coerce involuntary servitude, "it will not leave a party to exercise the law of the strong, and coerce it in his own behalf. A state of servitude thus produced, either by direct *or permissive* coercion, would not be considered voluntary either in fact or in law" (*The Case of Mary Clark, supra*, 1 Blackf. (Ind. S. C.) 122, 125). (Italics ours.) Just as the Courts cannot permit that petitioner be committed to jail to force him to work involuntarily for defendant (*Henderson* v. *Coleman, supra*), equally they cannot permit that defendant's dock boss assault and beat petitioner to force, or as a method to try to force him to work involuntarily for defendant (Cf. *The Case of Mary Clark, supra*).

Yet, the Court of Appeals decision herein amounts to just that and more. For, in every practical sense, it ratifies *ex post facto* the use by defendant's dock boss on defendant's behalf of force to try to make petitioner work for defendant, and, when petitioner has suffered a merciless, methodical beating for *refusing* involuntary servitude, the Court of Appeals now itself forces him *ex post facto* into the very condition of servitude which he suffered the beating to avoid—and the Court calls it "employment".

Normal risks of exit, such as the elevator risk involved in *Martin* v. *Metropolitan Life Ins. Co.*, 197 App. Div. 382, aff'd 233 N. Y. 653, relied on by the Court of Appeals herein, are within the scope of a voluntary contract of employment—at least if, as in the *Martin* case, employment has not been terminated, and the exit is merely on lunch hour. But the risk of assault being perpetrated by defendant's dock boss, after termination of a day laborer's employment, and for the very purpose of depriving petitioner of his rights under the Thirteenth and Fourteenth Amendments—as a "*method*" admittedly adopted to try to force petitioner into involuntary servitude of defendant—is no more a risk of exit than would be a similar assault for similar purpose if he were never an employee.

Suppose he called at defendant's pier to inquire respecting work, or attended one of the morning "shape-ups", but, being dissatisfied with terms offered, refused employment and started to leave for home, and was then assaulted to try to force him into involuntary servitude. In either case, exactly as in the case at bar, in all three cases alike, the only risk involved and which resulted in the injury was the risk of defendant, through its dock boss, in defiance of the Thirteenth and Fourteenth Amendments, adopting assault as a method to try to force petitioner into involuntary servitude of defendant. Identically in all three cases —and for precisely the same reasons—the "risk" involved was not a risk of safe exit nor a risk of employment, but a risk only of defendant through its dock boss violating the Thirteenth and Fourteenth Amendments by attempting

by assault to force petitioner into involuntary servitude of defendant.

A number of decisions hold that even where an employee is assaulted in course of his employment, and even when it arises out of employment, the assaulted employee may elect either to claim compensation or to sue for damages at common law, since it cannot be held as *against* him that such an assault is a risk of employment (*Bock* v. *Wong Hing*, 180 Minn. 470; *Heskett* v. *Fisher Laundry & Dry Cleaners Co.*, 217 Ark. 350; *De Coigne* v. *Ludlum Steel Co.*, 251 App. Div. 662). Perhaps defendant, demanding petitioner's services, would be estopped to contest a compensation claim—although it is not perceived how the insurance carrier would. But to force *petitioner* to pursue such a claim for this assault would be to force him, *ex post facto*, into involuntary servitude, just as defendant's dock boss attempted but petitioner has refused—and without his even having the election he would have had if he had been an employee.

The Court of Appeals concedes, and defendant has not seriously contested, defendant's liability unless the Workmen's Compensation Law is a defense. And liability of defendant is clear. For "if a corporation has itself no hands with which to strike, it may employ the hands of others; and * * * is liable civiliter" (*Denver & Rio Grande Ry.* v. *Harris*, 122 U. S. 597, 608).

The stipulated facts here do not even show a lack of express authorization to Cooke from the corporation. Paragraph 18 (R. 5) states only that Cooke was not authorized "*by Kane*, his superior, or anyone else in the *employ* of Moore-McCormack to strike or assault the plaintiff". Authorization "by Kane" or by "anyone else in the employ" of defendant would be immaterial in a field where Cooke himself was the one who, the stipulation shows (pars. 4-7, R. 3) had full authority. Rather, the very implication that they, themselves corporate employees like himself, could so authorize him if it fell within their jurisdiction, indicates that he was authorized or could authorize

himself where the field was one in which he had full jurisdiction, discretion and authority, as here.

But "It is not the test of the master's liability for the wrongful act of the servant, from which injury to a third person has resulted, that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable * * * the servant acted not only without express authority to do the wrong, but in violation of his duty to the master" (*McLoughlin* v. *N. Y. Edison Co.*, 252 N. Y. 202, 205-206; *Rounds* v. *Del., L. & W. R. R. Co.*, 64 N. Y. 129, 134). The discretion and act of force of the servant "becomes, as to third persons, the discretion and act of the master, and this, although the servant departed from the private instructions of the master" (*Rounds* v. *Del., L. & W. R. R. Co., supra*, 64 N. Y. 133-134). See also *Osipoff* v. *City of New York*, 286 N. Y. 422; *De Wald* v. *Seidenberg*, 297 N. Y. 335; *Cohen* v. *Dry Dock East Broadway & Battery R. R. Co.*, 69 N. Y. 170; *Dwinelle* v. *N. Y. C. & H. R. R. R. Co.*, 120 N. Y. 117; *Mott* v. *Consumers Ice Co.*, 73 N. Y. 543; *Oschenbein* v. *Shapley*, 85 N. Y. 214; *Palmeri* v. *Manhattan Ry. Co.*, 133 N. Y. 261; *Daniels* v. *Tearney*, 102 U. S. 415; *Barnes* v. *Chrysler Corp.*, D. C., N. D. Ill., 65 F. Supp. 806).

The discretion, method and acts of Cooke here were the discretion, method and acts of defendant.

POINT II

The reversal violates Rules 52 and 76 and due process of law by assuming as facts "employment", "accidental injury", and its "arising out of and in the course of employment", opposite to the findings inherent in the District Court's judgment and the facts shown by the record, and contrary to the Thirteenth and Fourteenth Amendments; and without considering or determining the sufficiency of the evidence to support the inherent District Court findings to the contrary and that the same were not "clearly erroneous."

There was similar violation in failing to adopt the District Court's correct determination of New York law and, instead, ruling differently on New York law without citing any New York statutory provision or decision in point which required or justified so ruling.

Under statutes patterned on the New York statute, this Court has held that whether or not an injury arises "out of" and "in the course of" employment is a question of fact, the determination of which by the District Court should be accepted by the Court of Appeals (*Parker* v. *Motor Boat Sales*, 314 U. S. 244; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504; *Richardson* v. *Britton*, C. A. D. C., 192 F. 2d 423). While they involved compensation claims, obviously what is or is not a question of fact is not controlled by the nature of the proceeding. In the *O'Leary* case, this Court recently took pains to state that its ruling was not controlled by the result. And *Richardson* v. *Britton* cited the *O'Leary* case in sustaining findings that the disability was *not* caused by the employment and was not compensable.

Jones v. *Herbert Equities, Inc.*, App. T. 1, 186 Misc. 163, aff'd 270 App. Div. 922, applied similar principles in affirming a holding that the Compensation Act was not a defense

because a finding was warranted by the evidence that the injury did not arise out of and in the course of employment and was due to the employer's negligence. It held, moreover, that, while the statute should be liberally construed "to enable the injured employee to obtain compensation", the employee also "is entitled to such liberal construction under the circumstances here as will sustain the recovery and judgment in her favor below".

In *U. S. v. Gypsum Co.*, 333 U. S. 364, reh. denied 333 U. S. 869, this Court held that Rule 52(a) applies to the Trial Court's inferences drawn from documents or undisputed facts, and that such inferences cannot be set aside unless "clearly erroneous". This also is the old rule (*Hyde v. Booraem*, 16 Pet. (41 U. S.) 169).

Prior to the adoption of the Federal Rules of Civil Procedure, moreover, it was well established that where both parties moved for a directed verdict as here the facts, including all inferences, are conclusively established in favor of the party (here, petitioner) whose motion was granted in District Court (*Beuttell v. Magone*, 157 U. S. 154; *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364; *C. & O. v. Martin*, 283 U. S. 209).

Moreover, this Court has established that a District Court's ruling on State law should be followed unless contrary to some controlling State Court decision on the point (*Reitz v. Mealey*, 314 U. S. 33, 39; *MacGregor v. State Mutual Life Assurance Co.*, 315 U. S. 280), and even considered dictum of State Court decisions should be followed if the precise point has not been squarely decided in State Courts (*Hawks v. Hamill*, 288 U. S. 52). The Eighth Circuit has held specifically that a District Court determination of State law should be accepted unless "clearly erroneous" (*Abbott v. Arkansas Utilities Co.*, C. C. A. 8, 165 F. 2d 339, 340; *Mogis v. Lynch-Richey Sand & Gravel Corp.*, C. C. A. 8, 189 F. 2d 130, 134).

Nevertheless, under the Rules of Decision statute, 28 U. S. C., Sec. 1652, State law is not to be followed "where

the Constitution * * * of the United States or Acts of Congress otherwise require or provide".

In view of the stipulated facts herein that petitioner's employment had terminated and that he was beaten because he refused to be re-employed and as a method of trying to force him to do so, it is doubtless a case where it should be ruled as matter of law that petitioner was not an "employee" when injured and that the injury did not arise "out of" and "in the course of" employment because no other inference would be possible (*Cox* v. *Coal & Coke Co.*, 80 W. Va. 295, 301; *Industrial Commission* v. *Bateman*, 126 Oh. St. 279, 281, 285; *Shoffler* v. *Lehigh Valley Coal Co.*, 290 Pa. 480, 483; *Matter of Beach* v. *Velzy*, 238 N. Y. 100, 102; and Point I, *supra*). But certainly it could not be ruled as matter of law that the only possible inference was that petitioner *was* employed at the time of the injury (*Matter of Burger*, App. Div. 3, 277 App. Div. 234, aff'd 303 N. Y. 654), or that the assault arose out of and in course of employment—contrary to the stipulated facts that he was assaulted and beaten because he *refused* employment. He would not have been beaten had he been employed, had he not terminated the employment, or had he consented to re-employment. The findings inherent in the District Court's judgment that petitioner was not an employee, that his injury did not arise out of nor in course of employment and was not accidental thus could not be held "clearly erroneous" (Cf. *Matter of Burger, supra*).

Reference is made to paragraph 23 of Reasons for Allowance of the Writ, Petition, *supra*, page 27, for numerous decisions of other Circuits and even of the Second Circuit itself holding that District Court findings were binding and could not be ignored or set aside but must be accepted unless "clearly erroneous".

The stipulated facts and the Agreed Statement of the Case under Rule 76 did not admit of so holding here, and the Statement, moreover, did not assert nor establish such a point, and contained nothing to provide a basis for the

Court of Appeals to so hold or determine (*United States* v. *Foster*, C. C. A. 8, 123 F. 2d 32).

But the more grave error of the Court of Appeals in its method of decision is that it did not even consider this aspect of the case nor the inherent necessity of setting aside the District Court findings in order to reverse, and the lack of any ground for doing so, nor consider nor purport to decide whether the District Court's inherent findings and rulings were "clearly erroneous", nor the "sufficiency of the evidence to support the findings", nor the failure of defendant as appellant to raise such questions (Cf. *United States* v. *Foster, supra*). It simply proceeded, contrary to the record, to recite employment, state erroneously that the "sole issue presented" was whether the injury was "accidental", rule that it was and then cite and misapply *Martin* v. *Metropolitan Life Ins. Co.*, 197 App. Div. 382, aff'd 233 N. Y. 653.

This method of decision itself would require review and reversal under Rules 52 and 76, not only because of the great injustice to this unfortunate plaintiff, but because of the national importance of this erroneous method of decision as a precedent under Rules 52 and 76 and the due process provisions.

Its citation of *Martin* v. *Metropolitan Life Ins. Co., supra*, is a key to its more fundamental error of begging the fundamental questions in the case. It cites the *Martin* case as authority for holding that the assault was incidental to petitioner's (terminated) employment, with consequently deduced exclusive applicability of the Workmen's Compensation Law, because the injury occurred while petitioner was leaving defendant's premises to go home. But in *Matter of Scholtzhauer* v. *C. & L. Lunch Co.*, 233 N. Y. 12; *Blake* v. *Head*, Eng. Ct. of Ap., 5 B. W. C. C. 303; *Bock* v. *Wong Hing*, 180 Minn. 470, and *Heskett* v. *Fisher Laundry & Dry Cleaners Co.*, 217 Ark. 350, for examples, the injury occurred even while the injured person was actually at work; yet the compensation laws were held inapplicable.

The *Martin* case involved merely an accidental injury of an employee caused by an elevator when she was leaving the office by the elevator on her lunch hour. The elevator was the normal method of exit; negligence in the condition or operation of the elevator was a normal risk of such exit.

The very question here, by contrast, was whether assault committed by a defendant's dock boss as a method to try to force petitioner to render involuntary servitude to defendant can be considered—or, rather, as matter of law, *must* be considered, so as to justify the reversal here—a normal risk of exit from a place of former employment. To cite the *Martin* case simply poses this question rather than resolves it.

This question involves not only the points that assault either by an employer (*Blake* v. *Head,* Eng. Ct. of Ap., 5 B. W. C. C. 303, 304, 305; *Boek* v. *Wong Hing,* 180 Minn. 470; *Le Pochet* v. *Pendleton,* 187 Misc. 296) or for which the employer is responsible under principles of respondeat superior (*Heskett* v. *Fisher Laundry & Cleaners Co., Inc.,* 217 Ark. 350; *De Coigne* v. *Ludlum Steel Co.,* 251 App. Div. 662; *Lavin* v. *Goldberg Building Material Corp.,* 274 App. Div. 690) is neither "accidental" (*Blake* v. *Head, supra; De Luca* v. *Coal Merchants Mutual Ins. Co.,* App. T. 1, 59 N. Y. Supp. 2d 664), nor a risk of employment (*Blake* v. *Head, supra; Conway* v. *Globin,* 105 Cal. App. 2d 495; *Barnes* v. *Chrysler Corp.,* D. C., N. D. Ill., 65 F. Supp. 806).

It involves not only the further point that a person or corporation while engaged in violating the national Constitution is not entitled to the benefits of the Workmen's Compensation Law (*Matter of Swihura,* 242 N. Y. 523; *Herbold* v. *Neff,* App. Div. 3, 200 App. Div. 244), and that, in this respect, violation of the Thirteenth and Fourteenth Amendments by attempting to force involuntary servitude is certainly more fundamental than violation of the former Eighteenth Amendment involved in the *Swihura* and *Herbold* cases.

But it involves also, still more importantly, the whole fundamental point that the Thirteenth and Fourteenth Amendments do not permit assault, admittedly committed for the very purpose and as a method to try to force petitioner to render involuntary servitude to defendant, to be treated as an "accidental injury arising out of and in the course of employment" so as to make a Workmen's Compensation Law and insurance policy as to "employees" a shield therefor.

The Constitution, moreover, does not permit creation of employment, *ex post facto*, by a Federal appellate Court judicially forcing petitioner to accept, *ex post facto*, the status of "employee", when the stipulated facts show that petitioner refused and came into Court still refusing to be an "employee" and was assaulted for the very reason that he refused to be an "employee" and as a method of trying to force him to render involuntary servitude to defendant.

It was a denial of due process, therefore, for the Court of Appeals to misapply *Martin* v. *Metropolitan Life Ins. Co., supra,* to beg these questions, and in this manner to fail or refuse to consider and decide these basic and fundamental points, and to deprive petitioner of his judgment without their determination (*Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267-268; *Grant* v. *Leach & Co.*, 280 U. S. 351, 358-359, 363; *Buzynski* v. *Luckenbach Steamship Co.*, 277 U. S. 226, 228-229; *Gerdes* v. *Lustgarten*, 266 U. S. 321, 327-328; *Brown* v. *Fletcher*, 237 U. S. 583, 587-588; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673; *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 380, 387-389; *Fowle* v. *Alexandria*, 11 Wheat. (24 U. S.) 320, 324). See also and compare *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, and *Lonergan* v. *United States*, 303 U. S. 33, 35, 36, holding it essential also to consider and determine an appellant's assigned errors.

To these questions, fundamental in connection with any attempt to reverse plaintiff's District Court judgment, the *Martin* case is not even material. And the fact that de-

fendant as the appellant did not even state them under Rule 76, nor attempt under Rule 52 to attack the District Court's findings and determination as "clearly erroneous" or to attack the "sufficiency of the evidence to support the findings", simply left the District Court's determination as binding (*United States* v. *Foster, supra*).

To allow the Court of Appeals decision to stand and destroy in this manner the judgment of the District Court would mean that a Court of Appeals in any case may circumvent and violate Rules 52 and 76 as well as due process of law by the simple device of summarily rewriting the record, Agreed Statement, findings and determination, without even considering those findings and determinations inherent in the judgment below, or whether they were "clearly erroneous", or the "sufficiency of the evidence to support" or even compel them; and may defeat the Thirteenth and Fourteenth Amendments by the simple device, as a method of decision, of carefully (or carelessly) ignoring them.

CONCLUSION

The decision of the Court of Appeals, reversing the District Court judgment for plaintiff, involves questions of the greatest importance upon which the Court of Appeals clearly erred, not only as respects jurisdiction and method of Federal appellate review and decision, and the meaning and effect of Rules 52 and 76 of Federal Rules of Civil Procedure, but involving the most fundamental rights of persons under the Thirteenth and Fourteenth Amendments and related statutes, and under State law interpreted in accordance therewith. Its decision is contrary to the Federal and New York State Constitutions, contrary to Federal statutory law, contrary to New York statutory and common law, contrary to decisions of this Court and in conflict with decisions of other Circuits and with decisions of the New

York State Courts; and a writ of certiorari should be granted and the case should be reviewed and reversed by this Court.

Respectfully submitted,

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OCT 4 - 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON,
Petitioner,

against

MOORE-McCORMACK LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT MOORE-McCORMACK LINES, INC., IN OPPOSITION

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Opinions Below

No opinion was delivered in the District Court. The opinion of the Court of Appeals for the Second Circuit (R. 17-18) is reported at 196 F. (2d) 295. No opinion was delivered in the Court of Appeals in denying appellant's petition for rehearing.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered April 30, 1952 (R. 18-19). The order of the Court of Appeals for the Second Circuit on appellant's petition for a rehearing was entered June 10, 1952 (R. 29-30). The petition for writ of certiorari was filed September 5, 1952 and was served September 9, 1952. The jurisdiction of this Court is invoked under Sections 1254(1) and 2101(c) of 28 U. S. Code.

Question Presented

The sole question raised upon appeal is whether the petitioner's exclusive remedy for his injuries is under the Workmen's Compensation Law of New York.

Statute Involved

The New York Workmen's Compensation Law, Sections 10 and 11, as enacted pursuant to Article 1, Section 18 of the New York Constitution. The applicable provisions of this Law are set forth as follows:

> "§ 10. Liability for compensation. Every employer subject to this chapter shall in accordance with this chapter, * * *, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury, * * *."
>
> "§ 11. Alternative remedy. The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, * * * at common law or otherwise on account of such injury * * *."

Statement

Petitioner seeks to review the judgment of the Court of Appeals for the Second Circuit reversing a judgment of the District Court in favor of petitioner. The controversy was submitted to the District Court upon a stipulation of facts (R. 2-5).

Petitioner has attempted to paraphrase the stipulated facts (R. 6-7), and by so doing, has omitted certain pertinent facts; viz., that petitioner had been employed by respondent for approximately a year before the assault occurred (Stipulation of Facts, Paragraph 4); that the assault occurred on respondent's premises before he and Cooke reached the exit (Stipulation of Facts, Paragraphs 13 and 16). The stipulated facts, fully set forth are:

1. The plaintiff, on the 20th day of September, 1950 was and still is a resident of the State of New York.

2. The defendant was a foreign corporation engaged in shipping. The defendant was the lessee of Pier 32, North River, New York. All operations incidental to shipping including freight handling were conducted at this pier.

3. The operation of the pier was under the direction of the defendant's terminal operator. Under the terminal operator was the superintendent of the pier, a Mr. Kane. Under Mr. Kane were the various dock bosses, which included the stevedore boss for the longshoremen and one Arthur Cooke who was the dock boss for the checkers.

4. The plaintiff was a checker in the employ of the defendant on September 20, 1950 and he had been so employed since September 1949. Plaintiff's work consisted of checking freight upon the pier under the direct supervision of Arthur Cooke, the dock boss in charge of checkers.

5. Cooke's duties consisted of employing the checkers needed to perform the daily work connected with the loading and unloading of vessels and in assigning the checkers to their various duties and locations.

6. Cooke had the authority to bind his employer, the defendant herein to contracts of hire for checkers only.

7. The checkers selected and employed by Cooke each morning would sign the timekeeper's book and punch the clock.

8. The plaintiff would "shape up" each morning unless he had been told on the previous day that there was work for him on the following day. The "shape up" consisted of reporting at the pier gate in order to determine if there were vessels ready for loading or unloading.

9. On the 20th day of September, 1950 the plaintiff proceeded with his customary duties until approximately 4:00 P. M. when a "work distributor" under Cooke instructed the plaintiff to complete the checking of a certain truck and to work overtime, if necessary, in order to complete the truck.

10. Under the custom the regular hours of employment were from eight o'clock in the morning until five o'clock in the afternoon, and overtime, if necessary, at an additional hourly rate. On September 20, 1950 the plaintiff worked overtime until approximately twenty minutes before 6:00 P. M., then went over, punched the clock and checked out.

11. After leaving the clock the plaintiff met Cooke who asked him why he was leaving the job while there were still other trucks to be checked.

12. The plaintiff and Cooke walked away from the clock toward the gate at the pier exit and during this time Cooke demanded that the plaintiff return to work.

13. Before they reached the exit and while on defendant's premises the plaintiff and Cooke stopped walking and faced each other.

14. The plaintiff put his hands into his pockets for a cigarette and the next thing he knew he was in a hospital.

15. For the purposes of this trial only the defendant will concede without admitting the truth thereof that Walter J. Grady, 104-22 123rd Street, Richmond Hill, New York and Michael Gorham, 120 West 64th Street, New York City, if called as a witness for the plaintiff would testify that they heard Cooke say to the plaintiff in a loud voice: "Who in hell do you think you are. Get back and punch the clock." They thereupon heard the plaintiff say to Cooke: "I am going home." They then saw Cooke hit the plaintiff with his right hand and the plaintiff fell striking his head on the corner of the concrete walk. They saw that the plaintiff was unconscious and had his hands in his pocket. The plaintiff was removed by ambulance to St. Vincent's Hospital.

16. Cooke and the plaintiff were on the defendant's premises when the blow was struck.

17. For the purposes of this trial it is conceded that Cooke struck the plaintiff because the latter refused to return to work.

18. It is conceded by the plaintiff that Cooke was never authorized by Kane, his supervisor, or anyone else in the employ of Moore-McCormack to strike or assault the plaintiff or anyone else.

19. The defendant carried adequate and appropriate compensation insurance against accidents arising under the Compensation Act and complied with the Workmen's Compensation Act in every respect.

New issues, totally unrelated to the issues raised by the stipulated facts, are presented by petitioner.

Petitioner argues that he was subjected to involuntary servitude, yet no such fact is contained in the agreed statement of facts. There is no stipulated fact that petitioner was forced by respondent to return to work or that Cooke assaulted petitioner in attempting to compel petitioner to return to work. There is no stipulated fact that petitioner refused to be employed. He had been employed that day and for about a year prior to the assault by respondent. He was assaulted because he refused to return to work (R. 4).

Petitioner contends that the decision of the United States Court of Appeals conflicts with the decisions of the New York Court of Appeals. There is no conflict. The New York Law was properly applied to the facts as stipulated.

But one issue is presented here: That the New York law had been properly applied to all of the facts set forth in the stipulation of facts so as to limit petitioner to his remedy to the benefits under the Workmen's Compensation Law.

POINT I

Petitioner's sole remedy against respondent is under the New York Workmen's Compensation Law.

An employee's exclusive remedy for accidental injuries arising out of and in the course of employment in the State of New York is governed by the New York Workmen's Compensation Law (Section 11).

Injuries sustained by an employee when assaulted by a fellow employee are "accidental injuries" within the meaning of the Workmen's Compensation Law.

In considering an assault by a foreman, the Court in *Matter of Knocks* v. *Metal Packing Co.,* 231 N. Y. 78, at page 82 said:

> "The injury to the claimant's eye was not designed, intended or expected. It was an unlooked-for and untoward event and an accident within the meaning of the act. * * * "

In *Mazzarado* v. *Levine and Davega-City Radios, Inc.,* 274 A. D. 122, a case similar to the case at bar, the employer's motion for summary judgment dismissing the complaint was granted. Plaintiff brought an action against his employer for injuries sustained as a result of an assault by defendant Levine, manager of the employer's store in which plaintiff worked. The employer pleaded the Workmen's Compensation Law as a complete defense and moved for summary judgment dismissing the complaint. Plaintiff's attorney, in opposition to the motion, asserted that the assault had nothing to do with the work in which Levine was engaged at the time of the assault and that the assault did not arise out of and in the course of plaintiff's employment. The Court wrote at page 124:

> "Despite the shifting positions of the plaintiff as alleged in the complaint and affidavit of his attorney aforesaid it is at least clear on this record that the plaintiff claims to have been the victim of an unprovoked assault by a fellow employee while engaged in the repair of radios in the course of his employment."

At page 126:

> " * * * On the present record it is our view that the plaintiff has no cause of action for damages against Davega whether or not the assault arose out of his employment. Of course, it is clear that the plaintiff's injuries would be compensable as an industrial accident if they arose out of his employment. In that case compensation would be the sole remedy against the employer. (Workmen's Compensation Law, § 11). * * * "

At page 127:

> "* * * The Workmen's Compensation Law deals with accidental injuries, and not with intentional wrongs. The commission of an assault by one employee upon another in the course and arising out of the employment may properly be deemed accidental from the standpoint of the employer as an untoward event not expected or intended. * * *"

Accordingly in the instant case, based upon the conceded facts, the plaintiff Whittington sustained accidental injuries and from the standpoint of the defendant Moore-McCormack Lines, Inc. the assault and the injuries resulting therefrom are deemed accidental since the defendant did not instigate nor direct the assault.

Accidental injuries sustained on the premises of an employer before an employee starts work or after he completes his work for the day arise out of and in the course of employment and are covered under the New York Workmen's Compensation Law.

The general rule in workmen's compensation cases, is stated in *Matter of Kowalek* v. *N. Y. Consolidated R. R. Co.*, 229 N. Y. 489, 492, as follows:

> "It is a general rule that if an employee is injured on the premises of the employer in going, with reasonable dispatch and method, to or from actual performance of the specific duties of the employment by a way provided by the employer or reasonably used by the employee, compensation must be awarded. The going to and from the actual work and the risk involved in it are reasonably incidental to the employment."
>
> *Matter of Lynch* v. *City of N. Y.*, 242 N. Y. 115;
> *Matter of Manville* v. *State of N. Y.*, 294 N. Y. 1.

The same rule is applied in a common law action by an employee against the employer. In the case of *Martin* v. *Metropolitan Life Ins. Co.*, 197 A. D. 382, affirmed 233 N. Y. 653, plaintiff sued her employer for negligence.

Plaintiff worked on the 11th floor of the employer's building. During her luncheon hour, she went down on one of the passenger elevators on a personal errand and was injured as she was about to leave the elevator. Since the employer was bound to furnish a safe entrance and exit from its premises, it was held that the plaintiff was covered by the Workmen's Compensation Law and could not recover in an action for negligence.

To the same effect is the case of *Bodie* v. *N. Y. & Queens E. L. & P. Co.*, 240 A. D. 856, affirmed 264 N. Y. 556. The memorandum decision of the Appellate Division reads in part as follows:

> "Judgment reversed on law and complaint dismissed with costs. Plaintiff, one of defendant's employees, claims to have been injured as a result of a fall down a flight of steps in defendant's building where she was employed, which steps it is alleged were unsafe. * * * Plaintiff's claim is that, while her employment began at nine o'clock in the morning, she arrived in the defendant's building at eight-thirty o'clock, intending first to pay an electric light bill and afterwards to report to work. She fell while entering the building. One of the defenses established is that defendant had secured its employees, including plaintiff, compensation for injuries arising out of and in the course of employment pursuant to the provisions of the Workmen's Compensation Law. The sole question of law is whether plaintiff's intent to pay her electric light bill before reporting for work takes this case out of the category of the cases arising under the Workmen's Compensation Law for injuries sustained while in the course of her employment, and renders the defendant liable in a common-law action. We think not. * * * "

Likewise in the case at bar, based upon the conceded facts, plaintiff Whittington was covered by the New York Workmen's Compensation Law since his accidental injuries were sustained upon the defendant's premises even though he had punched the clock and checked out.

The same rule has been applied by this Court in *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154 and *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418.

In view of the foregoing authorities, plaintiff's sole remedy for the accidental injuries which he sustained as a result of the assault is under the New York Workmen's Compensation Law and since the defendant carried adequate workmen's compensation insurance and had complied with the Workmen's Compensation Law in all respects, a common law action in negligence for said injuries cannot be maintained against the defendant.

Pursuant to the rule in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, the statutory and case law of New York is applicable and decisive of the issues herein.

There was no question of fact to be determined by the District Court. For this reason, the cases cited by petitioner (p. 50, Brief) do not apply. Those cases apply only where there are controverted issues of fact.

DeCoigne v. *Ludlum Steel Co.*, 251 A. D. 662; *Lavin* v. *Goldberg Building Material Corp.*, 274 A. D. 690, and *Heskett* v. *Fisher Laundry & Cleaners Co., Inc.*, 217 Ark. 350 (p. 54, Petitioner's Brief) involved determinations of the sufficiency of complaints which alleged that the employer committed the assault. They are inapplicable to the case at bar.

Nor was there a violation of any of petitioner's constitutional rights by the respondent. Petitioner has stipulated that respondent did not authorize this or any other assault (R. 5). Respondent cannot be held to have coerced petitioner into involuntary employment through an act which it did not authorize. The Constitution places no such onerous duty on an employer.

Petitioner is not without remedy. He is entitled to workmen's compensation benefits under the New York Workmen's Compensation Act.

POINT II

The petition and brief of petitioner present no issues reviewable by this Court.

No constitutional questions are involved under the stipulated facts. These stipulated facts negative any such question.

There is no conflict between the decision of the Court of Appeals for the Second Circuit and the decisions of the New York Court of Appeals applying the Workmen's Compensation Law of New York to the stipulated facts.

The decision of the Court of Appeals for the Second Circuit is correct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN P. SMITH,
Attorney for Respondent.

ALBERT P. THILL,
of Counsel.

JOHN NIELSEN,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON, *Petitioner,*

against

MOORE-McCORMACK LINES, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORATI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT

CHARLES ANDREWS ELLIS and
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Attorneys for Petitioner.

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RICHARD J. McANANY,
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PETITIONER'S REPLY BRIEF IN SUPPORT

This reply brief is submitted lest respondent's brief in opposition prove misleading upon the questions presented and the reasons for allowance of the writ.

Contrast of the Petition and Respondent's Brief

Respondent's brief in opposition states (p. 2) that "The sole question raised" is "whether the petitioner's exclusive remedy" is under the Compensation Law; or (p. 6) whether "the New York law has been properly applied to all of the facts".

Aside from those questions, respondent thus makes no reference to the questions presented under Rules 52 and 76, Fed. Rules Civ. Proc., nor to those expressly presented under the Thirteenth and Fourteenth Amendments of the

national Constitution. Rather, the brief for respondent in opposition states (p. 11) that "No constitutional questions are involved under the stipulated facts".

By contrast, however, the petition (pp. 11-15) states eight "Questions Presented". Those numbered 1 to 4 under "A" (pp. 11-12) cover both misconstruction, by the U. S. Court of Appeals, of the New York Workmen's Compensation Law to comprehend assault and battery committed as a method of trying to force petitioner into involuntary servitude of respondent, and violation thereby of the Thirteenth and Fourteenth Amendments.

Those numbered 5 to 8 under "B" (pp. 13-15) cover violation by the U. S. Court of Appeals of Rules 52 and 76, Fed. Rules Civ. Proc., the stipulated facts, the District Court's findings, and the Thirteenth and Fourteenth Amendments, in reversing the District Court judgment without properly considering the inferences from the agreed statement and the determination of the constitutional questions inherent in the District Court's judgment nor considering or determining whether these were or were not "clearly erroneous".

The petition (pp. 15-32) contains twenty-six "Reasons for Allowance of the Writ" covering violation by the U. S. Court of Appeals decision of the Thirteenth and Fourteenth Amendments and related statutes, the New York Workmen's Compensation Laws, and Rules 52 and 76, Fed. Rules Civ. Proc., and its conflict upon vital points with decisions of this Court, decisions of other Federal courts, decisions of the New York courts and decisions of courts of other States having similar workmen's compensation statutes.

POINT I

Either the State statute has been misinterpreted or it and the Court of Appeals reversal violate the Thirteenth and Fourteenth Amendments. This squarely presents the constitutional questions; the decision below reversing without their determination violates those constitutional provisions and due process, as well as Rules 52 and 76, and review here is "imperative".

This Court has frequently held that "In every case, therefore, where legislative abridgment" of "fundamental rights and liberties" is claimed "*the courts should be astute to examine the effect* of the challenged legislation" (*Schneider* v. *Irvington*, 308 U. S. 147, 161); that "where the issue is whether a State statute *in its application to facts which are set out in detail* • • • violates the Federal Constitution, this Court must analyze the facts • • • and draw its own inferences as to their *ultimate effect*" (*Truax* v. *Corrigan*, 257 U. S. 312, 325); and that "*It is imperative* that, when the effective exercise of these rights is claimed, the courts should 'weigh the circumstances'" (*Thornhill* v. *Alabama*, 310 U. S. 88, 96). (Italics ours.)

Moreover, "it is of prime importance that no constitutional freedom • • • be defeated by insubstantial findings of fact *screening reality*"; there is "the duty of this Court to enforce constitutional liberties even when denied through *spurious* findings of fact" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 293, 299). (Italics ours.)

In *Kelley* v. *Rhoads*, 188 U. S. 1, reversing 9 Wyo. 352, there was an agreed statement of facts, as here, upon which turned applicability of a state statute or a provision of the national Constitution, and this Court held that "The question turns upon the purpose for which the sheep were driven into the State" (188 U. S. 7). This Court held that "This question must be answered by the agreed statement

of facts", but that "different inferences may be drawn from those facts as to the applicability of the state statute" (188 U. S. 5), and held the State statute inapplicable because the agreed statement showed an interstate driving through for the purpose of shipment, sufficient to make the commerce provisions of the Constitution applicable.

Here, employment was by daily "shape up"—each day's employment being a separate contract. Plaintiff having checked out and started home, neither defendant nor plaintiff would be parties to a renewed employment without new hiring. Cooke "demanded" that petitioner "*return* to work", that he "*Get back and punch the clock*" to renew employment, and "Cooke struck the plaintiff because the latter *refused* to return to work" (R. 4).

Suppose the reverse demand had occurred; that plaintiff —being passed over in "shape up" or after conclusion of a day's employment and punching out—"demanded" that defendant reemploy him, and became violent on defendant's refusal and was injured or injured another. Would defendant be his "employer", with such violence and injury arising "out of" and "in the course of" his employment so as to entitle him to compensation? Yet, as respects liberty of contract "in the long-established constitutional sense", this Court holds: "The right is as essential to the laborer as to the capitalist" (*Coppage* v. *Kansas*, 236 U. S. 1, 14). Moreover, the Thirteenth Amendment specifically protects petitioner against "involuntary servitude"—and hence against being treated by the courts as an "employee" when he is assaulted for *refusing* to agree to be one.

Here, also, "In such a setting it could justifiably be concluded that the *momentum of fear* generated in past violence would survive" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 294). Respondent's very defense here is inconsistent with any claim that Cooke's assaulting "activities were unauthorized" (*H. J. Heinz Co.* v. *National Labor Rel. Board*, 311 U. S. 514, 521). And, despite the stipulation showing the assault after petitioner *terminated* his employment, and "*because* the latter *re-*

fused to return to work" (R. 4)—which even the Court of Appeals said "was the method he [the dock boss] adopted to try to *force* [petitioner] to work more overtime than the latter was willing to perform" (R. 17)—respondent in the lower courts, and still in this Court, claims an "employee" status for petitioner, subject to workmen's compensation as his exclusive remedy. It thus claims employment of petitioner, *not by petitioner's voluntary contract,* but by Cooke's dominion, hiring authority, detention, coercion and assault of petitioner after the petitioner had terminated such relationship and refused to renew it. It thus also seeks to gain for the future "the momentum of fear generated" in petitioner's assault (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 294).

Petitioner's claim of infringement of his constitutional rights under the national Constitution is itself ground for granting certiorari (*International Brotherhood* v. *Hanke,* 339 U. S. 470, 474). That these were earnestly pressed below both on original argument and on application for rehearing is clear from the petition for rehearing (R. 20, 23, 25-26).

Moreover, the requirement that District Court findings be accepted unless "clearly erroneous" has been applied even on appeal direct to this Court from the District Court (*U. S.* v. *Nat. Assn. R. E. B.,* 339 U. S. 485, 494-496).

A writ of certiorari should be granted.

Respectfully submitted,

CHARLES ANDREWS ELLIS and
RICHARD J. MCANANY,
Attorneys for Petitioner.

CHARLES ANDREWS ELLIS,
HARRY D. GRAHAM,
RICHARD J. MCANANY,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON,
Petitioner,

against

MOORE-McCORMACK LINES, INC.,
Respondent.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

CHARLES ANDREWS ELLIS and
RICHARD J. McANANY,
Attorneys for Petitioner.

CHARLES ANDREWS ELLIS,
HARRY D. GRAHAM,
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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, FRANK A. WHITTINGTON, respectfully moves for leave to file this petition for rehearing of the order of this Court denying the petition for writ of certiorari herein, entered October 27, 1952.

Grounds for Motion and Reasons for Granting Rehearing and Issuing the Writ

For more than 100 years this Court and other highest Courts have held, in repeated decisions, under common law and statutes alike, that the risks of the employment relationship are risks voluntarily assumed by respectively employer and employee, as allocated between them under the law.

and that the employee is assured freedom as to assumption of any risk by the right at any time to decline to commence or to refuse to continue service (*Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 58-62, and cases cited).

This Court, moreover, already has held that the compensation law here involved set aside one body of rules as to risks and their assumption and substituted another, whereby employer and employee, as voluntary coadventurers, assume the risks respectively allotted to them, and whereby the employee assumes the consequence in excess of the scheduled compensation of the risks of employment which had been differently allocated under common law (*New York Central Railroad Co.* v. *White*, 243 U. S. 188, 201, 204, 205), saying: "both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury as a probable and foreseen result" (p. 205).

Under neither system, however, as heretofore expounded and understood, is it "probable and foreseen" as a risk of the employment, nor does the employee assume either in whole or in part the risk, that his labor will be coerced or that injury will be inflicted upon him as a method adopted to try to coerce his labor. But the decision herein imposes upon him the assumption of this risk.

In the recent campaign candidates stated that there are 62 million workers in the United States who rely upon employment of their services for a living. Millions of them are subject to workmen's compensation laws; other millions to common law with or without other statutory modification. All alike contract and work under the background of the foregoing principles, and under the protective guaranties of the Thirteenth and Fourteenth Amendments against coercion of their labor. To all alike—and to their employers and the latter's insurers as well—the question whether private coercion of labor, and injuries sustained in such coercion, nevertheless are henceforth to be risks of employment assumed in whole or in part by the em-

ployee, is a constitutional, economic and social question of the first magnitude.

While the method of coercion herein was assault (as in *Alden Mills* v. *Pendergraft,* 149 Miss. 595, 602-603; *Barnes* v. *Chrysler Corporation,* DCND Ill., 65 F. Supp. 806, 807) and a workmen's compensation law was pleaded as defense (as in *Barnes* v. *Chrysler Corporation, supra*), this fundamental question would be the same if some different method of coercion and different form of proceeding were involved, and there were no compensation law to plead (e.g., *Shaw* v. *Fisher,* 113 S. C. 287; *Winthrop* v. *Allen,* 122 S. C. 536). In whatever form presented, "The issue is one of grave concern, both to employers and employees" (*Shaw* v. *Fisher, supra,* 113 S. C. at p. 290).

The question is directly presented here by a short record of agreed facts; and the "court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter" (*Schlemmer* v. *Buffalo, Rochester & Pittsburg Railway Co.,* 205 U. S. 1, 11).

It normally requires several years from injury for a case to reach petition in this Court. If, despite the conflicts on fundamentals shown in the petition, review be withheld by this Court until an identical case involving opposite decision on similar agreed statement reach this Court, the law as to assumed risks as heretofore settled and the Constitutional rights of some 62 million workers—as well as those of their employers and of liability and compensation insurers—will be jeopardized and confused to the irreparable injury of many;—and this petitioner and similarly coerced workers will be irreparably subjected to assumption of a loss which neither the statute nor the Constitution intend they should assume. This Court clearly has power, in its discretion, to reexamine the petition and grant the writ (*Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 305 U. S. 47, 50).

Wherefore, for the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

CHARLES ANDREWS ELLIS and
RICHARD J. MCANANY,
Attorneys for Petitioner

CHARLES ANDREWS ELLIS,
HARRY D. GRAHAM,
RICHARD J. MCANANY,
of Counsel.

Certificate of Counsel

I HEREBY CERTIFY that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to ground specified in Rule 33 of the Rules of this Court.

CHARLES ANDREWS ELLIS
Counsel for Petitioner

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IN THE

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OCTOBER TERM, 1952

No. 317

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MOORE-McCORMACK LINES, INC.,
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BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JOHN P. SMITH,
Attorney for Respondent.

JOHN NIELSEN,
of Counsel.

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Petitioner presents no grounds for granting this application.

Petitioner presents no intervening circumstances of substantial or controlling effect nor other substantial grounds available to petitioner but not presented previously. (Rule 33, subd. 2, Rules of the Supreme Court.)

Petitioner's present application is but a recapitulation of matters presented in his petition for writ of certiorari.

Wherefore, respondent submits that the petitioner's application for a rehearing of the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN P. SMITH,
Attorney for Respondent.

JOHN NIELSEN,
of Counsel.